

No. 97-174-CFX

Title: Cass County, Minnesota, et al., Petitioners
v.
Leech Lake Band of Chippewa Indians

Docketed:
July 30, 1997

Court: United States Court of Appeals for
the Eighth Circuit

Entry Date

Proceedings and Orders

Jul 8 1997	Petition for writ of certiorari filed. (Response due August 29, 1997)
Aug 5 1997	Brief of respondent Leech Lake Band of Chippewa Indians in opposition filed.
Aug 29 1997	Brief amici curiae of Lewis County, Idaho, et al. filed.
Aug 29 1997	Brief amici curiae of South Dakota, et al. filed.
Sep 4 1997	Reply brief of petitioners Cass County, Minnesota, et al. filed.
Sep 24 1997	DISTRIBUTED. October 10, 1997
Oct 15 1997	REDISTRIBUTED. October 31, 1997
Oct 31 1997	Petition GRANTED. SET FOR ARGUMENT February 24, 1998. *****
Dec 12 1997	Brief amici curiae of Michigan, et al. filed.
Dec 15 1997	Joint appendix filed.
Dec 15 1997	Brief of petitioners Cass County, Minnesota, et al. filed.
Dec 15 1997	Brief amici curiae of National Association of Counties, et al. filed.
Dec 15 1997	Brief amici curiae of Lewis County, Idaho, et al. filed.
Dec 15 1997	Appendix of Lewis County, et al. filed.
Dec 15 1997	Brief amicus curiae of Citizens Equal Rights Alliance filed.
Dec 22 1997	CIRCULATED.
Dec 30 1997	Record filed.
Jan 7 1998	Record filed.
Jan 8 1998	Order extending time to file brief of respondent on the merits until January 20, 1998.
Jan 13 1998	Brief amicus curiae of Lummi Indian Tribe filed.
Jan 15 1998	Brief amicus curiae of Confederated Tribes and Bands of the Yakama Indian Nation filed.
Jan 16 1998	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jan 16 1998	Brief of respondent Leech Lake Band of Indians filed.
Jan 20 1998	Brief amici curiae of Hoopa Valley Tribe, et al. filed.
Jan 20 1998	Brief amicus curiae of National Congress of American Indians filed.
Jan 20 1998	Brief amicus curiae of Saginaw Chippewa Indian Tribe of Michigan filed.
Jan 20 1998	Brief amici curiae of Grand Portage Band of Chippewa, et al. filed.
Jan 20 1998	Brief amicus curiae of Oneida Indian Nation of New York filed.
Jan 20 1998	LODGING consisting of ten sets of five documents submitted by counsel for amici Hoopa Valley Tribe, et al.
Jan 20 1998	Brief amici curiae of Tribes of Forest County Potawatomi

Entry Date

Proceedings and Orders

	Community, et al. filed.
Jan 20 1998	Brief amicus curiae of United States filed.
Jan 26 1998	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Feb 17 1998	Reply brief of petitioners Cass County Minnesota, et al. filed.
Feb 24 1998	ARGUED.

FILED
No. _____

97.174 JUL 8 1997

OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1997

CASS COUNTY, MINNESOTA; SHARON K.
ANDERSON, in her official capacity as Cass County
Auditor; MARGE L. DANIELS, in her official capacity
as Cass County Treasurer; STEVE KUHA, in his
official capacity as Cass County Assessor; JAMES
DEMGEN, in his official capacity as Cass County
Commissioner; JOHN STRANNE, in his official
capacity as Cass County Commissioner; Glen Witham,
in his official capacity as Cass County Commissioner;
ERWIN OSTLUND, in his official capacity as Cass
County Commissioner; VIRGIL FOSTER, in his official
capacity as Cass County Commissioner,

Petitioners,

vs.

LEECH LAKE BAND OF CHIPPEWA INDIANS,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Office of Cass County
Attorney

EARL E. MAUS
Cass County Attorney
Counsel of Record
Cass County Courthouse
P.O. Box 3000
Walker, MN 56484
Telephone: (218) 547-7255
Counsel for Petitioners

Of Counsel:

JAMES W. NEHER
Assistant Attorney General
State of Minnesota

QUESTION PRESENTED

Under the decision of this Court in *Yakima County v. Yakima Indian Nation*, 502 U.S. 251 (1992), is land originally patented by the United States Government, and subsequently reacquired in fee simple by an Indian band, subject to state and local government taxation if it remains freely alienable, irrespective of the statute or treaty under which it was originally conveyed?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
OPINIONS BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE.....	2
REASONS FOR GRANTING THE PETITION	6
I. There Is A Split In Circuit Court Authority On The Issue Of Whether Freely Alienable Land Owned By An Indian Tribe Is Subject To State And Local Government Taxation	7
II. The Applicability Of The <i>Yakima</i> Decision To The Taxability Of Tribal Land Raises An Important Question.....	11
III. The Decision Of The Court Of Appeals Is Erroneous	12
A. The Decision In <i>Yakima</i> That Fee-Patented Land Is Subject To Ad Valorem Taxation Is Grounded On The Alienability Of The Land, Not On The Burke Act Proviso.....	12
B. The Eighth Circuit Decision Erroneously Concluded That This Court Considered The Burke Act Proviso Necessary To Its Decision In <i>Yakima</i> , And That The Decision Cannot Be Read To Hold That Fee-Patented Land Is Taxable By Reason Of Its Alienability Alone	14
CONCLUSION	19

TABLE OF AUTHORITIES

	Page
DECISIONS	
<i>Goudy v. Meath</i> , 203 U.S. 146 (1906)	3, 9, 12, 15
<i>Lummi Indian Tribe v. Whatcom County, Washington</i> , 5 F.3d 1355 (9th Cir. 1993), <i>cert. denied</i> , 114 S.Ct. 2727 (1994).....	7, 8, 9
<i>Montana v. Blackfeet Tribe</i> , 471 U.S. 759 (1985).....	8
<i>Saginaw Chippewa Tribe v. State of Michigan</i> , 106 F.3d 130 (6th Cir. 1997).....	9, 10, 17
<i>County of Yakima v. Yakima Indian Nation</i> , 502 U.S. 251 (1992).....	<i>passim</i>
STATUTES	
Burke Act of 1906, 25 U.S.C. § 349 (1996)	<i>passim</i>
General Allotment Act of 1887, ch. 119, 24 Stat. 388.....	<i>passim</i>
Nelson Act of 1889, ch. 24, 25 Stat. 642	1, 2, 4, 5, 6
25 U.S.C. § 177 (1996)	2, 8
28 U.S.C. § 1331 (1996)	2
28 U.S.C. § 1362 (1996)	2
28 U.S.C. § 2201 (1996)	2
28 U.S.C. § 2202 (1996)	2
28 U.S.C. § 1254(1) (1996).....	1
42 U.S.C. § 1983 (1996)	2

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-29, *infra*) is reported at 108 F.3d 820. The opinion of the district court (App. 30-49, *infra*) is reported at 908 F. Supp. 689.

JURISDICTION

The court of appeals entered its judgment on March 6, 1997 (App. 2, *infra*), and petitioners' petition for rehearing was denied by order dated April 9, 1997 (App. 50, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1996).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

General Allotment Act of 1887, ch. 119, 24 Stat. 388, §§ 5 and 6; Nelson Act of 1889, ch. 24, 25 Stat. 642, §§ 3, 5 and 6; Burke Act of 1906, 25 U.S.C. § 349 (1996).

STATEMENT OF THE CASE

Respondent Leech Lake Band of Chippewa Indians ("the Band") brought this action for declaratory and injunctive relief against Petitioners¹ ("Cass County" or "the county") in the United States District Court for the District of Minnesota. The jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331, 1362, 2201 and 2202; 25 U.S.C. § 177; and 42 U.S.C. § 1983.

The issue in the district court case was whether certain lands originally patented by the federal government in fee, which have been reacquired by the Band, are subject to ad valorem taxation by the county. The lands in question were originally patented under three different provisions: (1) pursuant to the Nelson Act of 1889, 25 Stat. 642, "in conformity with" the General Allotment Act of 1887, 24 Stat. 388 ("the GAA") (thirteen parcels) (App. 61); (2) sold as pine lands pursuant to the Nelson Act (seven parcels) (App. 62); or (3) sold pursuant to the Homestead Act under the authority of the Nelson Act (one parcel) (App. 62-3).

Cross motions for summary judgment were filed by the parties, and the district court granted Cass County's motion. In granting the county's motion the court relied primarily on the decision of this Court in *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251 (1992), which held that lands allotted to individual Indians under the GAA, and subsequently reacquired in fee by individual

¹ The Petitioners include Cass County, Minnesota, and eight county officials.

Indians and the Yakima Nation itself, are subject to taxation by Yakima County, Washington. App. 37-8. In reaching its decision, the district court held that *Yakima* stands for the proposition that alienable lands originally patented by the federal government in fee, which have subsequently been reacquired by a tribe, remain freely alienable and therefore subject to ad valorem taxation. App. 46. Specifically, the district court relied on *Yakima* for its determination that Congress signaled its consent to taxation of the allotted lands through section 5 of the GAA, which rendered the allotted lands alienable and encumberable. App. 36-7. The district court explained:

In holding the Yakima Nation land subject to state taxation, the Supreme Court discussed §§ 5 and 6 of the GAA and its prior decision in *Goudy v. Meath*, 203 U.S. 146 (1906). However, it appears the Court relied on § 5 and the *Goudy* decision. In *Goudy*, the Supreme Court held that an Indian who was himself an allottee of land under the Treaty of December 26, 1854, 10 Stat. at L. 1132, was personally liable for property taxes assessed by the State of Washington. *Goudy*, 203 U.S. at 150. According to the *Yakima* court, it was the alienability of the Indian land in *Goudy* which rendered it subject to taxation. *Yakima*, 502 U.S. at 263. In *Yakima*, the court held that alienability was a consequence of § 5 of the GAA and, as a result, "when § 5 rendered the allotted lands alienable and encumberable, it also rendered them subject to assessment and forced sale for taxes." *Id.* at 263-64.

In concluding that the decision of this Court in *Yakima* was grounded on section 5 (App. 59), rather than on section 6, of the GAA, as amended by the Burke Act

(App. 64), the district court relied on the statement in the *Yakima* opinion to the effect that the Burke Act amendment to section 6 (the "Burke Act proviso"), which removed "all restrictions as to sale, incumbrance or taxation" of "prematurely" patented land, "reaffirmed" for such land "what section 5 of the GAA implied with respect to patented land generally: subjection to real estate taxes." App. 37. As a "reaffirmation" of taxability, the district court concluded that section 6, as amended by the Burke Act proviso, was considered by this Court to be unnecessary to its holding of taxability.² App. 37-8.

The court of appeals, in a two-to-one majority decision, affirmed in part and reversed in part the decision of the district court. The majority decision held that the thirteen parcels allotted under section 3 of the Nelson Act, which incorporated the allotment provisions of the GAA, were subject to taxation; but that the seven parcels originally sold as pine lands (sections 4 and 5 of the

² While the district court acknowledged that it was "difficult" to reconcile the general requirement that Congress "clearly manifest" its intention to allow taxation with the *Yakima* Court's statement that section 5 "implied" taxability, the court concluded that alienability is the "touchstone" for taxability. App. 37. The district court did, however, provide an "alternative holding" which would subject to taxation the thirteen parcels allotted under section 3 of the Nelson Act, which "inarguably" incorporated into its provisions the allotment provisions of the GAA, but would hold exempt the eight parcels which originally were sold by the federal government under the pine land provisions of the Nelson Act (sections 4 and 5) and the Homestead Act in accordance with section 6 of the Nelson Act. App. 47-8. This "alternative holding" provided by the district court is the same as the actual decision of the Court of Appeals.

Nelson Act) and the single parcel sold under the Homestead Act (section 6 of the Nelson Act) were exempt from taxation. App. 22-3. The court set out three interrelated bases for its decision.

First, the court stated that Cass County's position that the pine lands and homestead parcels are subject to taxation is incorrect because, in adopting an "alienability equals taxability" analysis, it fails to give due consideration to the rule established by Supreme Court precedent that Congress must provide its "unmistakably clear intent" to allow "state taxation of Indians or their property." App. 12. That error occurs, the court of appeals stated, in relying primarily on section 5 of the GAA dealing with alienability of the allotted lands, while disregarding the import of the Burke Act proviso in section 6 which, in the words of the court, was referred to repeatedly by this Court in *Yakima* "as the primary source of clear congressional intent to allow the ad valorem tax levied by Yakima County." App. 12-13. Thus, the court of appeals reasoned that *Yakima* should be read to have based its holding of taxability on the Burke Act proviso, which would permit taxation of only those lands patented by the federal government under the allotment provisions of the GAA (which does not include the pine land and homestead parcels).

Second, the court of appeals stated that "the County's reading of *Yakima* also disregards" the Court's conclusion in that case that "the § 6 Burke Act proviso authorized the ad valorem tax, but not the excise tax levied [on sales of reservation land] by Yakima County." App. 13. The court of appeals considered that distinction significant because, in its view, if the *Yakima* Court had

considered alienability to mandate taxability, it would have sustained the excise tax as well as the ad valorem tax. *Id.* Thus, under the reasoning of the court of appeals, since the *Yakima* Court found that the Burke Act proviso authorized assessment of the ad valorem, but not the excise tax, it must be a prerequisite to assessment of the ad valorem tax. And the court reasoned further that, since the proviso does not apply to the pine land and homestead parcels which originally were patented by the federal government pursuant to laws other than allotment under the GAA (as adopted by the Nelson Act), those parcels must be exempt from ad valorem taxation.

Finally, the court of appeals noted that the *Yakima* Court, after holding that the land in question was taxable under the GAA, remanded the case based on the Yakima Nation's assertion that it was "not clear whether the parcels at issue . . . were patented under the General Allotment Act, rather than under some other statutes in force prior to the Indian Reorganization Act." 502 U.S. at 270. The court concluded that the remand was an indication that the *Yakima* decision did not equate alienability with taxability, because if that were the case "it should not have mattered under which act the land was made alienable – the mere fact of alienability should have been enough to allow state taxation." App. 14.

REASONS FOR GRANTING THE PETITION

This case presents a question on which there is a split among the circuits requiring resolution by this Court. The decision below conflicts with a decision of the Ninth

Circuit on the issue of whether "alienability equals taxability." And the Sixth Circuit is also in conflict with the Ninth Circuit on that issue. This split among the circuits, on an important issue that can arise in many states, casts doubt on the authority of states and their local government units to tax freely alienable land owned by Indian tribes. Since the issue has been fully explored by the three circuit courts that have addressed it, there is no need for this court to allow it to further percolate in the lower courts before resolving it.

I. There Is A Split In Circuit Court Authority On The Issue Of Whether Freely Alienable Land Owned By An Indian Tribe Is Subject To State And Local Government Taxation.

In the decision below the Eighth Circuit held that certain of the land parcels at issue in this case, notwithstanding that they are freely alienable by the Band, are not subject to ad valorem taxation because they were not originally patented under the GAA. This holding is in direct conflict with the ruling of the Ninth Circuit in *Lummi Indian Tribe v. Whatcom County, Washington*, 5 F.3d 1355 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 2727 (1994), that alienable land owned by an Indian tribe is taxable irrespective of how it was originally patented by the federal government.

In *Lummi* the Ninth Circuit considered an appeal by the Tribe from a summary judgment order denying it declaratory and injunctive relief from the assessment and collection of Washington's ad valorem property tax. The land in question was originally allotted by the federal

government in 1884 under the Treaty of Point Elliott,³ and reacquired by the Tribe in fee simple in the 1970's and early 1980's. *Id.* at 1356-57. In its lawsuit the Tribe claimed that the land was exempt from taxation because it had originally been allotted "under the Treaty of Point Elliott rather than the General Allotment Act, which permits such taxation." *Id.* at 1356. The Ninth Circuit, in a two-to-one majority decision, affirmed the holding of the district court that the land, because it was freely alienable by the Tribe,⁴ was subject to taxation under the *Yakima* decision. The court said in part:

A state cannot tax reservation lands or reservation Indians unless Congress has " 'made its intention to [authorize state taxation] unmistakably clear.' " [*Yakima*] at ___, 112 S. Ct. at 688 (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765, 105 S. Ct. 2399, 2402, 85 L.Ed.2d 753 (1985)). In *Yakima Nation*, the Court found an unmistakably clear intent to tax fee-patented land. It did

³ The Treaty of Point Elliott, a compact between numerous tribes and bands of Indians in Northern Puget Sound, created the Lummi Indian Reservation in 1855. The Treaty authorized the subdivision of the Reservation into land parcels which could be assigned to individuals or families. *Id.* at 1356.

⁴ The tribe also contended in *Lummi* that the land in question was inalienable under the Indian Nonintercourse Act, 25 U.S.C. § 177. The court held that the applicable decisional and statutory authority establishes that "once Congress removes restraints on alienation of land, the protections of the Nonintercourse Act no longer apply." 5 F.3d at 1359. In this case, the Eighth Circuit stated that it was unnecessary to consider the Nonintercourse Act since the case turned on whether there was an expression of unmistakably clear congressional intent to allow taxation of the parcels in question. App. 15.

not rely on section 6 of the General Allotment Act as Yakima County proposed [footnote omitted], concluding instead that the land's alienable status determines its taxability. See *id.* at ___, 112 S. Ct. at 688-691. The Court made no distinction between fee land allotted by treaty and that allotted under the Act. Its interpretation of section 5 of the Act and the proviso to section 6 imply that no matter how the land became patented, it is taxable once restraints against alienation expire.

Id. at 1357. The *Lummi* majority also noted that the *Yakima* Court discussed its decision in *Goudy v. Meath*, 203 U.S. 146 (1906), citing that case as authority "for the proposition that alienable land is taxable unless explicitly exempted." *Id.* at 1358. Thus, the decision of the Eighth Circuit in this case, holding that land owned in fee by an Indian tribe is not subject to taxation solely as a result of its free alienability, is in direct conflict with the *Lummi* decision holding, in effect, that "alienability equals taxability."

The third decision contributing to the split among the circuits is *Saginaw Chippewa Tribe v. State of Michigan*, 106 F.3d 130 (6th Cir. 1997). *Saginaw* involved land parcels originally allotted in 1864 under a treaty between the United States and the Chippewa Tribe, which were subsequently repurchased by both the Tribe and individual members of the Tribe. The Sixth Circuit, by a unanimous panel, reversed the district court and held that the parcels in question, though freely alienable, were not subject to

ad valorem taxation by the State of Michigan or its political subdivisions.⁵ *Id.* at 131-32.

The basis for the *Saginaw* panel's holding was its conclusion that this Court's decision in *Yakima* was grounded not on section 5 of the GAA dealing with the alienability of the land allotted under the Act, but on the Burke Act proviso amending section 6 of the Act. That proviso permitted the Secretary of the Interior, in his discretion, to issue fee patents prior to expiration of the general twenty-five year trust period set out in the GAA, and provided that, following the issuance of such a "premature" patent, "all restrictions as to sale, incumbrance, or taxation of said land shall be removed." *Id.* at 133. The *Saginaw* panel determined that the Burke Act proviso applied to all lands allotted under the GAA (both before and after expiration of the twenty-five year trust period), and was necessary to this Court's holding of taxability in *Yakima*. For that reason, the court concluded that, since lands conveyed under the GAA are subject to taxation "only because of the explicit language of the Burke Amendment," the *Yakima* decision cannot be extended to lands originally patented under other laws or treaties solely on the basis that they are alienable. *Id.* at 133-34.

Thus, both the Eighth Circuit decision in this case and the Sixth Circuit decision in *Saginaw* are in direct conflict with the Ninth Circuit decision in *Lummi*. This split among the circuits regarding the applicability of the

⁵ The State of Michigan has filed a Petition for a Writ of Certiorari in the *Saginaw* case. *State of Michigan, et al. v. United States of America and Saginaw Indian Tribe of Michigan*. Docket No. 97-14 (filed June 30, 1997).

Yakima decision to tribal lands patented under laws and treaties other than the GAA, which bears directly on the question of whether the free alienability of tribal land mandates its taxability, foreshadows an increase in conflicting interpretations of *Yakima* as this taxability issue is litigated in other circuits.

II. The Applicability Of The *Yakima* Decision To The Taxability Of Tribal Land Raises An Important Question.

In light of the split among the circuits regarding the correct interpretation of the *Yakima* decision, as well as the likelihood that the question will arise in the context of future acquisitions by tribes of lands originally allotted under a variety of laws and treaties, the applicability of that decision to the taxability of tribal lands raises an important question requiring resolution. It is inevitable, as a result of the conflicting interpretations of *Yakima's* import among the three circuits, and the large number of tribal land transactions taking place across the country, that additional litigation on the question presented will develop in the future. Considering the thorough analysis of this important issue in three Court of Appeals decisions, two of which included dissents, there is no need for this Court to await additional decisions before resolving this conflict among the circuits. Moreover, the question of taxability versus exemption with respect to tribal lands is one of financial significance to both the states and the tribes. Thus, there is an urgent need for this Court's guidance to provide certainty regarding the extent of a state's power under the *Yakima* decision to impose a property tax on freely alienable tribal land.

III. The Decision Of The Court Of Appeals Is Erroneous.

A further reason to grant the petition is that the decision of the Court of Appeals is erroneous because it is not in accord with this Court's decision in *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251 (1992).

A. The Decision In *Yakima* That Fee-Patented Land Is Subject To Ad Valorem Taxation Is Grounded On The Alienability Of The Land, Not On The Burke Act Proviso.

Cass County does not contend that the Burke Act proviso is wholly irrelevant to the question presented in this case. The *Yakima* opinion recognized that the proviso provides "express authority for taxation of fee-patented land." 502 U.S. at 258. This Court noted, however, that in *Goudy v. Meath*, 203 U.S. 146, 149 (1906), the Court held that Indian allottees became subject to state tax laws under section 6 of the GAA upon expiration of the twenty-five year trust period "without even mentioning the Burke Act proviso." *Id.* Further, the *Yakima* Court, in placing the *Goudy* decision in perspective, made it clear that that decision was not grounded on section 6 of the GAA, even without consideration of the Burke Act proviso. The Court said:

Goudy did not rest exclusively, or even primarily, on the § 6 grant of personal jurisdiction over allottees to sustain the land taxes at issue. Instead, it was the *alienability of the allotted lands* – a consequence produced in these cases not by § 6 of the General Allotment Act, but by § 5 – that the Court found of central significance.

Thus, when § 5 rendered the allotted lands alienable and encumberable, it also rendered them subject to assessment and forced sale for taxes.

Id. at 263-64 (emphasis by Court; footnotes omitted). With respect to the Burke Act proviso itself, which permitted issuance of fee patents to certain allottees prior to expiration of the twenty-five year trust period prescribed under the GAA, but which did not subject an allottee to *plenary* state jurisdiction, the Court stated that the fact the proviso freed the land of "all restrictions as to sale, incumbrance or taxation," merely "*reaffirmed* for such 'prematurely' patented land what section 5 of the General Allotment Act implied with respect to patented land generally: subjection to state real estate taxes." *Id.* at 264 (emphasis added; footnote omitted).

As a further clarification of its decision, the Court, apparently in response to an expression of concern by *Amicus Curiae* United States, made it clear that, as to the question of taxability, it was of no moment whether land was originally patented in fee pursuant to section 5 of the GAA (after expiration of the twenty-five year trust period) or pursuant to the Burke Act proviso as "prematurely" patented land. The Court said:

Since the proviso is nothing more than an acknowledgment (and clarification) of the operation of § 5 with respect to all fee-patented land, it is inconsequential that the trial record does not reflect "which (if any) of the parcels owned in fee by the Yakima Nation or individual members originally passed into fee status pursuant

to the proviso, rather than at the expiration of the trust periods. . . . " Brief for United States as *Amicus Curiae* 13, n. 10.

Id. at 264, n.4.

To summarize, freely alienable tribal land is subject to ad valorem taxation irrespective of how it was originally patented; and it is clear that this Court, in arriving at its decision in *Yakima*, did not consider the Burke Act proviso necessary to its holding of taxability.

B. The Eighth Circuit Decision Erroneously Concluded That This Court Considered The Burke Act Proviso Necessary To Its Decision In *Yakima*, And That The Decision Cannot Be Read To Hold That Fee-Patented Land Is Taxable By Reason Of Its Alienability Alone.

Notwithstanding the express language in *Yakima* to the effect that the Court's holding of taxability was grounded on the alienability of the lands at issue in that case, the Eighth Circuit majority opinion erroneously determined that the pine land and homestead parcels, having been patented under laws other than the GAA containing the Burke Act proviso, were exempt from taxation.

The thrust of the majority's reasoning in arriving at its decision is that: (1) this Court has established the longstanding rule that a state cannot tax Indians or their property unless Congress has given its permission to do so in unmistakably clear terms; (2) the *Yakima* Court's reference to the alienability of the lands at issue in that case can be read only to "imply" permission to tax, falling

short of the required "unmistakably clear" language; and (3) the Burke Act proviso grants permission to tax with the requisite clarity and is therefore the provision in the GAA upon which this Court based its holding in *Yakima*. App. 12-13.

While it is true that this Court has consistently declined to permit state taxation of Indians or their property absent a finding of "unmistakably clear" congressional authorization, 502 U.S. at 688, it is apparent that the Court found such authorization in section 5 of the GAA, as discussed in the *Goudy* decision. In clarifying the holding in *Goudy*, the Court said in *Yakima*:

As the first basis of its decision, before reaching the "further" point of personal jurisdiction under § 6, *id.*, at 149, 27 S. Ct. at 50, the *Goudy* Court said that, although it was certainly possible for Congress to "grant the power of voluntary sale, while withholding the land from taxation or forced alienation," such an intent would not be presumed unless it was "clearly manifested." *Ibid.*

Id. at 263. The only reasonable interpretation of this statement, as with the other quotes from *Yakima* discussed above, is that the Court has concluded that the release of restrictions on alienability is a sufficiently clear indication, absent an express exemption, of Congress' permission to tax.⁶

⁶ It is noteworthy that the dissent in *Yakima* considered the majority's decision to be based on the section 5 alienability provisions, not on the Burke Act proviso. 502 U.S. at 272-73 (Blackmun, J., concurring in part and dissenting in part).

The court of appeals, however, interpreted *Yakima* as holding that, without the Burke Act proviso, taxation of the land in that case would not have been allowed. In quoting from the *Yakima* decision, 502 U.S. at 259, to the effect that this Court considered the Burke Act proviso to indicate "a clear intention to permit" state taxation of the land in question, the court of appeals takes that language as a statement by the Court that the proviso is the *required* source of congressional permission to tax. App. 15-16. Viewing the Court's discussion of the proviso in the context of the entire *Yakima* decision, however, especially in light of express statements that the taxability of fee-patented land is the result of its alienability, the language relied upon by the majority is nothing other than a clarification of the Court's determination that the proviso constituted a "reaffirmation" of Congress' grant of authority to tax found in section 5 of the GAA. Both the *Lummi* decision and the dissent in this case recognized that distinction.

An additional indication of the majority's misunderstanding of this Court's holding in *Yakima*, is its misinterpretation of the reasoning underlying the Court's refusal to permit imposition of the excise tax on *sales* of land, while sustaining imposition of the ad valorem tax on the land itself. As the majority points out, the *Yakima* decision, while holding that the GAA authorized Yakima County to impose an ad valorem tax on tribal land, held that it did not authorize imposition of an excise tax on sales of that land. App. 16. The majority concluded that:

If alienability always equals taxability, it should be the nature of the property right, not the nature of the tax, that matters. If that were the

rule, the Court should have upheld both the ad valorem and the excise taxes levied by the County since the land was made alienable by the GAA.

Id. That conclusion is incorrect. Rather than basing its excise tax holding on the nature of the Tribe's ownership interest in the property, this Court made it clear in *Yakima* that the difference in the *incidence* of the two taxes was the determinative factor leading to the conclusion that the GAA, while authorizing an ad valorem tax on tribal land, did not authorize an excise tax on sales of that land. *County of Yakima*, 502 U.S. at 269-70. In short, the *Yakima* Court did not draw a distinction between the ad valorem tax and the excise tax based on the nature of the Tribe's ownership interest in the real estate. It drew a distinction between them based on the conclusion that the GAA authorized only a tax whose incidence is on the land itself, not a tax whose incidence is on "transactions involving land."⁷ *Id.* For this reason, the *Yakima* Court's holding that the excise tax is unenforceable as outside the purview of the GAA is separate and apart from its holding on the ad valorem tax issue, and in no way implies that this Court would have upheld the excise tax had it based its holding of taxability on the alienability of the land in question.⁸

⁷ It is apparent that this Court focused on the Burke Act proviso in the course of its discussion of the excise tax issue because *Yakima* County contended that the proviso authorized imposition of the excise, as well as the ad valorem, tax.

⁸ The court in *Saginaw Chippewa Tribe v. State of Michigan*, 106 F.3d 130 (6th Cir. 1997), made the same interpretational error in discussing the excise tax question. 106 F.3d at 133-34.

Finally, the majority opinion in this case stated that the Court's remand in *Yakima* "left open the question of whether land allotted under a different act might be taxed or not." App. 14 (footnote omitted). To the contrary, the remand was at the instance of the Yakima Nation which contended that it was not clear, as a factual matter, whether the lands in question were patented under the GAA or "some other statutes in force prior to the Indian Reorganization Act." 502 U.S. at 270. This Court stated simply that "[w]e leave for resolution on remand that factual point, and the prior legal question whether it makes any difference." *Id.* For all of the aforesaid reasons, the Eighth Circuit decision in this case is erroneous.

CONCLUSION

In light of the split among the circuits on the question presented, the likelihood of additional conflicting decisions regarding the taxability of freely alienable tribal land, and the Eighth Circuit's erroneous decision in this case, petitioners respectfully request that the Court grant this petition.

Dated: July, 1997

Respectfully submitted,
Office of Cass County
Attorney

EARL E. MAUS
Cass County Attorney
Counsel of Record
Cass County Courthouse
P.O. Box 3000
Walker, MN 56484
(218) 547-7255

Of Counsel:

JAMES W. NEHER
Assistant Attorney
General
State of Minnesota

Counsel for Petitioners

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-4263

Leech Lake Band of Chippewa Indians, *
Plaintiff/Appellant, *

v. *

Cass County, Minnesota; Sharon K. *
Anderson, in her official capacity as *
Cass County Auditor; Marge L. Daniels, *
in her official capacity as Cass County *
Treasurer; Steve Kuha, in his official *
capacity as Cass County Assessor; James *
Demgen, in his official capacity as Cass *
County Commissioner; John Stranne, *
in his official capacity as Cass County *
Commissioner; Glen Witham, in his *
official capacity as Cass County *
Commissioner; Erwin Ostlund, in his *
official capacity as Cass County *
Commissioner; Virgil Foster, *
in his official capacity as *
Cass County Commissioner, *

Defendants/Appellees. *

United States of America, *

Amicus Curiae. *

White Earth Band of Chippewa Indians, *

Amicus Curiae. *

Fond Du Lac Band of Chippewa *
Indians, *

Amicus Curiae. *

* Appeal from
* the United
* States District
* Court for the
* District of
* Minnesota

Submitted: October 23, 1996

Filed: March 6, 1997

Before MAGILL, BRIGHT, and MURPHY, Circuit Judges.

MURPHY, Circuit Judge.

This case involves the tax status of land within an Indian reservation which was once alienated from Indian ownership and subsequently reacquired by the tribe in fee simple. In 1993 Cass County, Minnesota levied an ad valorem tax on such fee land owned by the Leech Lake Band of Chippewa Indians. The Band paid the taxes under protest and sought a declaratory judgment that the land is immune from state taxation, an injunction ending the taxation, and an order refunding the taxes already paid. Based on its interpretation of *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992), the district court granted summary judgment for Cass County. The Band appeals. We affirm in part and reverse in part.

I.

The Leech Lake Band of Chippewa Indians is a federally recognized Indian tribe, whose reservation is located in northern Minnesota. The reservation was created by a series of treaties with the United States government, beginning in 1855 and ending with an executive order in 1874. See, e.g., *Treaty with the Chippewas*, Feb. 22, 1855, 10 Stat. 1165 (1855); *Leech Lake Band of Chippewa Indians v.*

Herbst, 334 F. Supp. 1001, 1002 (D. Minn. 1971). Although the pattern of land ownership within the reservation has varied over the years, the reservation has never been disestablished or diminished. See *Herbst*, 334 F. Supp. at 1002 (D. Minn. 1971) (involving hunting and fishing rights); *State v. Forge*, 262 N.W.2d 341, 343-44 (Minn. 1977) (same).

The Band's original reservation was impacted by changes in federal Indian policy. During the latter part of the nineteenth century, the United States adopted an allotment policy in order to break up reservations previously established by treaty. This policy granted allotments of land to individual tribal members and sold the often sizable remainder of reservation land to non-Indians. See Felix S. Cohen, *Handbook of Federal Indian Law* 127-38 (1982). The purpose of the policy was to open land to non-Indians and to assimilate the Indian people into the broader American society. *Id.* at 128. The overall effect was drastically to reduce the amount of land under Indian control. *Id.* at 138.

The legislative centerpiece of the allotment policy was the General Allotment Act (GAA), ch. 119, 24 Stat. 338 (1887), (codified as amended in scattered sections of 25 U.S.C.) (sometimes referred to as the Dawes Act). Under the GAA, parcels of land to be granted to individual Indians were initially held in trust by the United States. Section 5 of the GAA provided that after a twenty-five year trust period, the United States would convey the

land in fee simple to the individual allottee.¹ During the trust period the allottees were not permitted to convey the land. Section 6 of the GAA provided that the allottees would be subject to state civil and criminal law.

In 1906 Congress amended the GAA by the Burke Act, ch. 2348, 34 Stat. 182 (1906). The Burke Act amended § 6 of the GAA to make clear that allottees would be subject to state law only after the expiration of the trust period and issuance of a patent in fee simple.² *Yakima*, 502

¹ Section 5 of the GAA provides the actual authorization for issuing fee patents to individual Indian allottees. Section 5 of the GAA states, in part:

[A]t the expiration of said [trust] period the United States will convey [the allotted lands] by patent to said Indian . . . in fee, discharged of said trust and free of all charge or incumbrance whatsoever. . . . And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void. . . .

25 U.S.C. § 348 (1996).

² After the Burke Act amendments, § 6 provides in pertinent part:

At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, . . . then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside. . . . Provided, That [sic] the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all

U.S. at 264. The Burke Act contained a proviso which enabled the Secretary of the Interior to issue a fee simple patent before the expiration of the twenty-five year trust period to "competent and capable" allottees. Burke Act, ch. 2348, 34 Stat. 182 (1906). The proviso stated that land allotted under the GAA would be free from restrictions on "sale, incumbrance, or taxation" when a patent was issued in fee. *Id.*; see *Yakima*, 502 U.S. 264 n.4.

For the Leech Lake Band and other Minnesota Chippewa tribes, the allotment policy was carried out through the Nelson Act of 1889, ch. 24, 25 Stat. 642 (1889), which partially incorporated the GAA. The Nelson Act created a commission to negotiate with the Band for the "cession and relinquishment" of its reservation land. *Id.* The Leech Lake Band agreed in 1889 to have land disbursed under the Nelson Act and the agreement went into effect in 1890.

The details of the negotiations with the Leech Lake Band are unclear, but there is some evidence that representatives of the United States told other Minnesota Chippewa tribes that the land allotted to the individual tribal members would not be taxed. During the negotiations a member of the White Earth Band of Chippewa Indians asked the United States' lead negotiator, Harry M. Rice, this question: "I should like to ask whether,

restrictions as to sale, incumbrance, or taxation of said land shall be removed.

25 U.S.C. § 349 (1996).

when the Dawes bill³ refers to the civil and criminal laws, those provisions apply so as to make our people here subject to the taxation of the white man?" Mr. Rice responded: "I think you will come within the same rule as officers at the United States forts; their property is not taxed." *The Chippewa Indians in Minnesota*, H.R. Ex. Doc. No. 247, at 93 (1890). Individuals from other tribes were present during this colloquy. *Id.* Cases involving other bands and other legislation have suggested that the land might only be free from taxation during the original trust period, however. *Mahnomen County, Minn. v. United States*, 319 U.S. 474, 480 (1943) (Murphy, J., dissenting) (land allotted to Mahnomen County Band of Chippewa Indians under Clapp Act exempt from taxation for twenty-five years); *United States v. Spaeth*, 24 F. Supp. 465, 469 (D. Minn. 1938) (land allotted to a White Earth Chippewa Indian under Clapp Act exempt from taxation for twenty-five years).

The Nelson Act disposed of reservation land in three ways. The allotment of land to individual Indians under § 3 of the Nelson Act was done in conformity with the GAA, and Leech Lake tribal members were allotted land either within the Leech Lake reservation or within the reservation of the White Earth Band of Chippewa Indians, which is also in northern Minnesota. The rest of the land was made available to the general public. Some was sold under §§ 4 and 5, the pine lands provisions, and the rest was sold under § 6 pursuant to the Homestead Act, ch. 75, 12 Stat. 392 (1862).

³ Section 3 of the Nelson Act incorporated the Dawes Act. Nelson Act, ch. 24, 25 Stat. 642, 643 (1889).

Federal Indian policy changed substantially once again in 1934 with the passage of the Indian Reorganization Act (IRA), ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-479 (1996)). The IRA reestablished federal recognition of Indian tribes, and while it did not repeal allotment statutes such as the Nelson Act, it ended the allotment policy and sought to reverse the erosion of the tribal land base by extending indefinitely the trust period for all land held by the United States in trust for Indian tribes. 25 U.S.C. §§ 461-462. The Band is governed in part by a constitution adopted by the Minnesota Chippewa Tribes pursuant to the IRA. See § 476.

The Leech Lake Band managed to preserve its tribal identity despite the federal allotment policy and has maintained a continuing presence on its reservation land. During the allotment period over three quarters of the tribal members who were allotted land remained within the Leech Lake reservation boundaries. 4 Folwell, *History of Minnesota* 235 (1930). Nonetheless, by 1977 the Band and individual tribal members owned only 27,000 acres, or less than five percent of the reservation land. See *Forge*, 262 N.W.2d at 343 & n.1 (Minn. 1977). In an effort to rebuild what was lost through the allotment policy, the Band began slowly to recover its land base.

The land in question in this case consists of twenty-one parcels within the boundaries of the reservation. The legal description of each parcel is found in paragraph ten of the Band's complaint. This land was once held in trust for the Band by the United States according to terms of their treaties, but was later alienated from tribal control under provisions of the Nelson Act. Thirteen of the parcels were allotted to individual Indians under § 3 of the

Act; seven parcels were sold as pine lands under §§ 4 and 5 for commercial timber harvest by non-Indians; and one parcel was distributed under § 6 as a homestead plot to a non-Indian. Subsequently, all parcels came to be held by non-Indians, but the Band reacquired each parcel in fee between 1980 and 1992.

Cass County did not impose its ad valorem tax on these parcels until 1993, one year after the Supreme Court issued its *Yakima* decision. The Court had held in *Yakima* that Indian lands originally allotted under the GAA were subject to certain types of state taxation. 502 U.S. at 270. It found that the language of § 6 of the GAA supported an ad valorem tax on such land, but not an excise tax on its sale. *Id.* at 266-70. The Band initially declined to pay the taxes levied by Cass County, but eventually paid under protest in order to avoid foreclosure. By July 1, 1995 it had paid a total of over \$64,000 in taxes.

In June 1995, the Band filed suit in federal court seeking a declaratory judgment that the lands are not taxable by the County. The district court granted summary judgment in favor of Cass County, holding that all land alienated from tribal control under the Nelson Act was taxable. *Leech Lake Band of Chippewa Indians v. Cass County*, 908 F. Supp. 689 (D. Minn. 1995). The court interpreted *Yakima* to mean that land held by Indian tribes is taxable by the state if it is freely alienable and dismissed the Band's case.⁴

⁴ Although judgment was entered in favor of the County, the court also provided an "alternative holding" under which the pine land and homestead parcels would be found not taxable since only § 3 of the Nelson Act incorporated the GAA.

II.

On appeal the Band contends that *Yakima* can be distinguished from the present case both factually and legally. The Band asserts that *Yakima* was concerned primarily with fee land owned by individual tribal members rather than the tribe itself. The principle of tribal sovereignty can defeat state taxation here it says.

Yakima cannot be so easily distinguished, however. The land involved in that case was held both by individual Indians and the tribe itself. 502 U.S. at 256, 270. Although tribal sovereignty can be an impediment to the exercise of state jurisdiction over Indians and their property, see, e.g., *Montana v. United States*, 450 U.S. 544, 565-66 (1981), considerations of inherent sovereignty may not prevent certain forms of taxation. *Yakima*, 502 U.S. at 257-58 (noting that "platonic notions of Indian sovereignty . . . have, over time, lost their independent sway." (citations omitted) (internal quotations omitted)).

In *Yakima*, the county had imposed an ad valorem tax on all real property and an excise tax on the sale of such property.⁵ It believed that these taxes applied to all land within the county, even land patented in fee under the GAA and owned by the Yakima Indian Nation or individual tribal members within the reservation boundaries.

908 F. Supp. at 697. The district court indicated that this would be its conclusion if *Yakima* should be read as reaffirming the long-standing principle that Congress must provide unmistakably clear intent to permit state taxation of Indian lands.

⁵ In contrast, Cass County has only imposed an ad valorem tax.

When the county threatened to foreclose on certain parcels for which taxes had not been paid, the tribe brought suit for declaratory and injunctive relief. The Supreme Court held that the GAA authorized the ad valorem tax levied by Yakima County, but not the excise tax. 502 U.S. at 270. The ad valorem tax was acceptable because the Burke Act proviso permitted the "taxation of . . . land," and this was sufficient to overcome the Court's per se rule against state taxation of Indians or their land. *Id.* at 267-68. The language of the proviso was not sufficient to indicate Congress had authorized an excise tax on the sale of such land, however. *Id.* at 268-69.

The meaning of *Yakima* as precedent is crucial to the outcome of the case before this court. The Band argues that *Yakima* is consistent with many other cases requiring an "unmistakably clear" congressional intent to allow any form of state taxation. According to the Band, the Court found unmistakably clear congressional intent for the ad valorem tax by examining the text and effect of both § 5 and § 6 of the GAA.⁶ Section 5 made the land to be transferred alienable, a necessary precondition to state taxation of Indian lands. It was § 6, however, as amended by the Burke Act proviso, that provided the unmistakably clear intent to allow such taxes. The Band points out that this is the reading of *Yakima* adopted in *Southern Ute*

⁶ As discussed above, § 5 of the GAA provides that after a 25 year period during which the United States would hold allotments in trust for individual Indians, fee patents would be issued to the allottees. Section 6 of the GAA provides that the individual Indian allottee with a fee patent would be considered a citizen subject to the laws of the state or territory in which he or she resided.

Indian Tribe v. Board of County Comm'rs, 855 F. Supp. 1194 (D. Colo. 1994), *vacated*, 61 F.3d 916 (10th Cir. 1995) (on ripeness grounds). *Southern Ute* read *Yakima* to mean that the alienability established in § 5 "was not an independent justification for taxation," but rather an implication of taxability, while the specific language of § 6, as amended by the Burke Act proviso provided the "unmistakably clear" congressional intent to allow such taxation. *Southern Ute*, 855 F.Supp. at 1200.

Cass County, on the other hand, argues that *Yakima* stands for the proposition that if Indian lands are made alienable in any way, they are taxable by the state. Section 5 of the GAA, making allotments alienable, is seen as the key to the validity of the ad valorem tax in *Yakima*. The County finds support in two cases which have interpreted *Yakima* to mean "alienability equals taxability." *Lummi Indian Tribe v. Whatcom County, Wash.*, 5 F.3d 1355 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 2727 (1993); *Saginaw Chippewa Tribe v. Michigan*, 882 F. Supp. 659 (E.D. Mich. 1995), *rev'd*, Nos. 95-1574, 95-1575, 1997 WL 20402 (6th Cir. Jan. 22, 1997). Both *Lummi* and the district court in *Saginaw* seized on the relatively brief discussion of § 5 in *Yakima* as evidence that an act of Congress can subject Indian lands to state taxation by doing nothing more than making them alienable. *Lummi*, 5 F.3d at 1357-58; *Saginaw*, 882 F. Supp. at 672.

Subsequent to oral argument in this case the Sixth Circuit reversed the *Saginaw* district court. *Saginaw Chippewa Indian Tribe v. Michigan*, Nos. 95-1374, 95-1575, 1997 WL 20402 (6th Cir. Jan. 22, 1997). The Sixth Circuit concluded that *Yakima* was consistent with the general rule requiring unmistakable congressional intent to permit

taxation of Indian land and that making land alienable does not in itself show the requisite intent. It stated the Court's holding as follows:

In *Yakima*, the Supreme Court held that "by specifically mentioning immunity from land taxation as one of the restrictions that would be removed upon conveyance in fee, Congress in the Burke Act proviso manifested a clear intention to permit the state to tax such Indian lands."

Saginaw, 1997 WL 20402, at *4, citing *Yakima*, 502 U.S. at 259. Despite the Sixth Circuit's thorough discussion of *Yakima* and earlier precedent on which the dissent relies in this case, the dissent mentions this decision only in passing.

The County's theory that alienability always equals taxability is unsatisfactory because it fails to consider the language and context of the entire *Yakima* opinion. First, as the County concedes, its reading conflicts with the *Yakima* opinion itself and with Supreme Court precedent requiring Congress to provide unmistakably clear intent before allowing state taxation of Indians or their property. See *Yakima*, 502 U.S. at 258 (citing *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1986)).

Second, in order to support its argument, the County must read *Yakima* as resting its conclusion solely on the effect of the alienability section of the GAA. This reading disregards the significance given by the Court to the language of § 6 of the GAA. It repeatedly pointed to the Burke Act proviso in § 6 as the primary source of clear

congressional intent to allow the ad valorem tax levied by Yakima County. 502 U.S. at 258-59.

Third, the County's reading of *Yakima* also disregards the language and analysis in section III of the opinion. In section III, the Court separately analyzed each type of tax at issue and concluded that the § 6 Burke Act proviso authorized the ad valorem tax, but not the excise tax levied by Yakima County. 502 U.S. at 268. As the Sixth Circuit noted in *Saginaw*,

Rather than finding that alienable Indian lands are subject to excise taxes on the general policy grounds advocated by the defendants, the [*Yakima*] Court carefully parsed the language of the General Allotment Act to determine whether or not Congress expressed an unmistakably clear intention to subject the land to such taxes.

Saginaw, 1997 WL 20402, at *5. If alienability always equals taxability, it should be the nature of the property right, not the nature of the tax, that matters. If that were the rule, the Court should have upheld both the ad valorem and the excise taxes levied by the County since the land was made alienable by the GAA. Instead, the Court refused to uphold the excise tax because it found that the language of the Burke Act proviso could not justify the imposition of such a tax. *Id.* at 268-70. Under the County's reading of *Yakima*, section III of the opinion would be superfluous and the Court would have reached a different result.

Finally, if alienability were equivalent to taxability, it is difficult to explain the terms of the remand in *Yakima*.

That remand left open the question of whether land allotted under a different act might be taxed or not.⁷ If alienability equaled taxability it should not have mattered under which act the land was made alienable – the mere fact of alienability should have been enough to allow state taxation.

To determine if a state may tax Indians or their property, the Supreme Court has consistently asked whether Congress has made its intent to allow state taxation unmistakably clear. The Court in *Yakima* stated the rule strongly:

[S]tate jurisdiction over the relations between reservation Indians and non-Indians may be permitted unless the application of state laws "would interfere with reservation self-government or impair a right granted or reserved by federal law." (citation omitted) In the area of state taxation, however, Chief Justice Marshall's observation that "the power to tax involves the power to destroy," *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431, 4 L. Ed. 579 (1819), has counseled a more categorical approach: "[A]bsent cession of jurisdiction or other federal statutes permitting it," we have held, a State is

⁷ The scope of the *Yakima* remand was as follows:

The Yakima Nation contends it is not clear whether the parcels at issue in these cases were patented under the General Allotment Act, rather than under some other statutes in force prior to the Indian Reorganization Act (citations omitted). We leave for resolution on remand that factual point, and the prior legal question whether it makes any difference.

without power to tax reservation lands and reservation Indians. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148, 93 S. Ct. 1267, 1270, 36 L. Ed. 2d 114 (1973). And our cases reveal a consistent practice of declining to find that Congress has authorized state taxation unless it has "made its intention to do so unmistakably clear." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765, 105 S. Ct. 2399, 2403, 85 L. Ed. 2d 753 (1985); see also, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215, n.17, 107 S. Ct. 1083, 1091, n.17, 94 L. Ed. 2d 244 (1987).

502 U.S. at 258. Both sides in the case also framed the proper inquiry as whether the GAA evinced an unmistakably clear congressional intent to permit state taxation. *Id.* at 258-60. *Yakima* inquired whether Congress had made its intent to allow state taxation unmistakably clear and found that Congress had for the ad valorem tax, but not for the excise tax. *Id.*⁸

The Burke Act amendment to § 6 of the GAA was identified after inquiry as the main source of the unmistakably clear congressional intent to allow the state ad valorem tax. For example, in the third paragraph of section II, the Court states:

Yakima County persuaded the Court of Appeals, and urges upon us, that express authority for

⁸ The Band argues that even if alienability were always to equal taxability, the lands in this case would not be taxable because they are not alienable under the Non-Intercourse Act, 25 U.S.C. § 177 (1996). Since this case turns on whether an unmistakably clear congressional intent has been expressed to allow state taxation of the parcels, it is not necessary to consider any issue related to the Non-intercourse Act.

taxation of fee-patented land is found in § 6 of the General Allotment Act, *as amended* [by the Burke Act proviso] (emphasis added) (footnote omitted). We have little doubt about the accuracy of that threshold assessment. . . . And we agree with the Court of Appeals that by specifically mentioning immunity from land taxation "as one of the restrictions that would be removed upon conveyance in fee," *Congress in the Burke Act proviso "manifest[ed] a clear intention to permit the state to tax" such Indian lands.* (emphasis added) (citation omitted).

502 U.S. at 259.

The Burke Act proviso was also seen as the main source of statutory ambiguity where the state excise tax levied by Yakima County was concerned. "While the Burke Act proviso does not purport to describe the entire range of in rem jurisdiction States may exercise with respect to fee-patented reservation land, we think it *does describe the entire range of jurisdiction to tax.*" *Id.* at 268 (emphasis added). The Court concluded that the language of the proviso did not clearly permit a state excise tax, noting that "the short of the matter is that the General Allotment Act explicitly authorizes only 'taxation of . . . land,' not 'taxation with respect to land,' 'taxation of transactions involving land,' or 'taxation based on the value of land.'" *Id.* at 269. "It is quite reasonable to say, in other words, that though the object of the *sale* here is land, that does not make land the object of the *tax*, and hence does not invoke the Burke Act proviso [which only authorizes the 'taxation of . . . land']." *Id.* at 268-69.

The County counters by pointing to one particular sentence for the strongest evidence that *Yakima* should be

read to mean alienability equals taxability. The dissent also describes this sentence as the specific holding of *Yakima*. The sentence states: "Thus, when § 5 rendered the allotted lands alienable and encumberable, it also rendered them subject to assessment and forced sale for taxes." *Id.* at 263-64. As the Sixth Circuit points out, however:

When read out of context, this statement seems to support the defendants' claim that any congressional act making Indian land alienable is sufficient to show a clear intention to make the land subject to property tax. Within the context of the *Yakima* opinion, however, *this statement was merely part of an explanation of the structure of the General Allotment Act.*

Saginaw, 1997 WL 20402, at *2 (citations omitted) (internal quotation omitted) (emphasis added).

In the very next sentence to the one relied on by the County, the Court noted that "the Burke Act proviso, enacted in 1906, made this implication of § 5 explicit, and its nature more clear." *Id.* at 264. The import of this latter sentence is that § 5 only implied taxability. This reading is confirmed four sentences later when the Court states that the Burke Act proviso "reaffirmed for such 'prematurely' patented lands what § 5 of the General Allotment Act implied with respect to patented land generally: subjection to state real estate taxes." *Id.*

The *Yakima* Court thus understood § 5 to be only an implication of taxability, and § 6, as amended by the Burke Act proviso, was needed to show the necessary clear intent to tax. No court has taken the position that an implication alone is sufficient to provide unmistakably

clear congressional intent to allow state taxation, and *Yakima* found an unmistakably clear congressional intent to allow state taxation on land by relying on both the language and effect of §§ 5 and 6, as amended, of the GAA. Without alienability there would be no taxability, but it does not follow that alienability alone is sufficient to provide the requisite unmistakable intent. Something like the language of the Burke Act proviso in § 6 is needed to find unmistakably clear intent to allow state taxation. *Id.* at 259.

The history of the Burke Act also demonstrates that § 6, as amended, is the source of the necessary clear intent to allow state taxation of land (but not its sale). The proviso was passed in reaction to the Supreme Court's decision in *In re Heff*, 197 U.S. 488 (1905), which held that § 6 of the GAA subjected an Indian allottee to the personal jurisdiction of the state the moment the allotment in trust was made. *Yakima*, 502 U.S. at 264. Since the land was still being held in trust by the United States, it was presumably not taxable by a state even though personal jurisdiction existed over the titular owner of the land.⁹

⁹ In the debates preceding the enactment of the Burke Act, Rep. Curtis stated:

The main advantage of [the Burke Act] is that under [its decision in *In re Heff*] the Supreme Court has held that after a patent has issued [in trust], notwithstanding the Indian does not secure a title in fee for twenty-five years, he becomes a citizen of the United States, and that State courts have full jurisdiction over him, but not over his property. . . . Now, this bill, if enacted, will leave him under the

Heff, 197 U.S. at 509 (distinguishing personal jurisdiction from jurisdiction over the land). *In re Heff* thus created a situation where the state could have jurisdiction over the Indian allottee, but not over his or her land.

The purpose of the Burke Act legislation was, at least in part, to clarify the post-*Heff* reach of state jurisdiction over Indians receiving allotments. *Yakima*, 502 U.S. at 264. The Burke Act amendment accomplished two things. First, it changed the point at which state law would apply to an allottee Indian from the time when a trust patent was first issued to the time when a patent was issued in fee. *Id.* Second, it made clear that an allottee could be subject to taxation upon issuance of a fee patent. *Id.* at 259. The Burke Act proviso to § 6 of the GAA is thus the primary source of the requisite clear congressional intent to allow state ad valorem taxes on Indian lands.

The *Yakima* Court discussed § 5 and alienability in a single paragraph of section II of its opinion. That paragraph addressed the relevance of *Goudy v. Meath*, 203 U.S. 146 (1906), to the arguments of the Yakima Nation and the United States as amicus.¹⁰ *Goudy* had held that an Indian

control of the [federal] Government until he secures a patent conveying the fee. . . .

40 Cong. Rec. 3599 (1906).

¹⁰ The Court discussed alienability and *Goudy* to distinguish *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 462 (1976), from the case of Yakima Nation. *Moe* had held that § 6 of the GAA did not give a state general personal jurisdiction over Indians within a reservation. 425 U.S. at 478. In *Yakima* the tribe and the United States argued that *Moe* meant a state could not impose an ad valorem tax on Indian land, 502 U.S. at 262, but the Court felt that this interpretation of *Moe*

allottee could be personally liable for delinquent real estate taxes on fee land allotted under the GAA. The *Goudy* Court found liability for two reasons. First, the Court noted that it would be strange for Congress to remove restrictions on alienation of the land and not subject it to taxation. *Id.* at 149. Second, the Court found that the language of § 6 extended the laws of the state or territory to the Indian allottee, including the state tax laws. *Id.* at 149-50.

Yakima characterized the *Goudy* decision as one in which alienation was of central significance to the finding of liability. 502 U.S. at 263. The Court never suggested that *Goudy* relied exclusively on the alienability of the land. Instead, the *Goudy* decision premised liability on both the alienability of the land and the specific language of § 6 of the GAA. *Goudy*, 203 U.S. at 149-50. *Goudy* is therefore analogous to *Yakima* where the Court relied on both the express language of § 6, as amended by the

amounted to an implied repeal of § 6 and it was not willing to read *Moe* that broadly. *Id.* Instead the Court concluded that, as in *Goudy*, a contributing factor to the taxability of the land was that it had been made alienable under § 5. The *Yakima* Court raised *Goudy* and alienability, not to depart from its precedent requiring an unmistakably clear congressional intent to allow state taxation, but in order to distinguish *Moe* and to demonstrate that § 6 remained a viable source of unmistakable intent for in rem taxing jurisdiction.

Burke Act proviso,¹¹ and the § 5 alienability of the land, which created the necessary conditions for taxation.

In sum, the County's reading of *Yakima* conflicts with other language in the opinion itself, and with strong Supreme Court precedent espousing an unmistakably clear congressional intent rule. While the Court considered alienability as one factor contributing to the taxability of the land, alienability alone was not sufficient to allow state taxation. The express language of the Burke Act proviso in § 6 of the GAA was needed to make sufficiently clear the intent of Congress to allow state ad valorem taxes.

III.

The parcels of land involved in this case were alienated from tribal control by the Nelson Act and subsequently reacquired by the Band in fee. State taxation of Indian land is not authorized unless Congress "has made its intention to do so unmistakably clear." *Yakima*, at 258, quoting *Montana v. Blackfeet Tribe*, 471 U.S. at 765. The question in this case is whether the Nelson Act evinces an "unmistakably clear" congressional intent to allow an ad valorem tax on these parcels.

¹¹ The district court suggested that the Burke Act amendment reaffirmed the Supreme Court decision in *Goudy*. That amendment actually predated the *Goudy* decision, however. The Burke Act was passed on May 8, 1906, and *Goudy* was decided on November 19, 1906. Although the *Goudy* opinion does not specifically mention the language of the Burke Act proviso, that language was presumably available for the consideration of the Court.

Eight of the 21 lots were sold as pine lands or distributed as homestead lands under § 4, § 5, or § 6 of the Nelson Act. These sections of the Act, unlike § 3, did not incorporate the GAA or include any mention of an intent to tax lands distributed under them which might become reacquired by the Band in fee. These parcels are therefore not subject to state taxation.

Section 3 of the Nelson Act allotted certain lands on the Leech Lake reservation by incorporating the mechanisms of the GAA. The Band argues that the GAA itself does not evince an unmistakably clear intent to allow ad valorem taxes on tribally held land because §§ 5 and 6 of the GAA only address the allotment of land to individual Indians, but that argument cannot be reconciled with the holding of the Supreme Court in *Yakima*. *Yakima* held¹² that after the addition of the Burke Act proviso, lands allotted under the GAA are subject to state ad valorem taxes when they are patented in fee. 502 U.S. at 266-70. This is true for both lands allotted to individual Indians

¹² The Court specifically stated:

We hold that the General Allotment Act permits Yakima County to impose an ad valorem tax on reservation land patented in fee pursuant to the Act, but does not allow the county to enforce its excise tax on the sale of such land.

502 U.S. at 270. This explicit statement of the holding follows the Court's discussion in section III describing how the language of the Burke Act proviso provides the unmistakably clear congressional intent to allow the state ad valorem tax, but not the excise tax. The dissent locates what it views as the holding elsewhere in a paragraph discussing the Court's previous decision in *Goudy*. We follow the explicit holding as stated by the Supreme Court.

and lands subsequently reacquired by a tribe. *See id.* at 256, 270. For these reasons the land which passed under § 3 of the Nelson Act is taxable if it was patented after the passage of the Burke Act proviso in 1906, but not if it were patented before then.¹³

In sum, the judgment in favor of the County is vacated. The district court is affirmed in its determination that the County may apply its ad valorem tax to land allotted under § 3 of the Nelson Act, unless any parcel is shown to have been patented in fee before the passage of the Burke Act. The judgment is reversed as to the parcels which passed under the pine lands or homestead sections of the Act and the case is remanded for consideration of

¹³ In theory, every parcel in dispute here should have been patented in fee after 1906. The Nelson Act was passed in 1890. Given a twenty-five year trust period, the earliest a fee patent should have issued was 1915. The administration of the allotment policy was not always smooth or consistent, however. *See* Felix S. Cohen, *Handbook of Federal Indian Law* 132-34 (1982) (describing "piecemeal process" of amending and developing the allotment program after the passage of the GAA). The record does not reveal when these parcels were patented in fee, and it is possible, if not likely, that some were patented before 1906. *See, e.g., United States v. Thurston County, Neb.*, 143 F. 287, 288 (8th Cir. 1906) (noting 1902 amendment to the GAA allowed Indian devisee to sell or convey inherited allotment before expiration of trust period); *Nat'l Bank of Commerce v. Anderson*, 147 F. 87, 90 (9th Cir. 1906) (same); *see also* LeAnn Larson LaFave, *South Dakota's Forced Fee Indian Land Claims: Will Landowners be Liable for Government's Wrongdoing?*, 30 S. D. Law Rev. 59, 65 & n.42 (1984) (noting congressional practice of issuing premature fees through special legislation before 1906); Delos Sacket Otis, *The Dawes Act and the Allotment of Indian Lands* 150-51 (F. Prucha ed., University of Oklahoma Press 1973) (same).

that portion of the Band's claim for refunds which is still relevant and for any necessary proceedings consistent with this opinion.

MAGILL, Circuit Judge, concurring in part and dissenting in part.

I concur in section III of the majority opinion to the extent that it affirms the district court's conclusion that the allotted lands in this case were properly taxed by Cass County. I respectfully dissent from the remainder of the majority's decision.

In 1993 Cass County, Minnesota, (County) began imposing ad valorem taxation on lands held in fee simple by the Leech Lake Band of Chippewa (Band), a federally recognized Indian tribe, on the Leech Lake Reservation.¹⁴ The Band brought this action in the district court seeking

¹⁴ This case involves twenty-one parcels of land which were originally held in common by the Band under aboriginal title and which were subsequently held in trust by the United States. In 1889 Congress enacted the Nelson Act, ch. 24, 25 Stat. 642, which allotted land held in common by the Band to individual Indians. Thirteen of the parcels in this case were so allotted and eventually became alienable. The Nelson Act also disposed of surplus lands, including lumbering lands (pine lands) and homesteads, to non-Indians. Seven of the parcels were originally sold as pine lands, and the remaining parcel was originally sold as a homestead. The twenty-one parcels were reacquired by the Band after 1980. Some of the land is undeveloped, while there are tribal facilities on other parcels. Although the Band successfully converted other reacquired lands – including a casino – to trust status, see Summ. J. Tr. at 9; see also 25 U.S.C. § 465 (statutory procedure for placing lands in trust with the United States), the title to the twenty-one parcels at issue in this case are held by the Band in fee simple.

injunctive relief from future taxation by the County and a judgment for the \$64,000 in taxes which it has paid, under protest, to the County. Relying on *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251 (1992), the district court held that the taxation had been proper, and granted summary judgment to the County. I would affirm.

In *Goudy v. Meath*, 203 U.S. 146 (1906), the United States Supreme Court held that alienable lands held by a member of the Puyallup Tribe were subject to state taxation. The Court reasoned:

That Congress may grant the power of voluntary sale, while withholding the land from taxation or forced alienation, may be conceded. . . . But while Congress may make such provision, its intent to do so should be clearly manifested, for the purpose of the restriction upon voluntary alienation is protection of the Indian from the cunning and rapacity of his white neighbors, and it would seem strange to withdraw the protection [of the restriction on alienation] and permit the Indian to dispose of his lands as he please, while at the same time releasing it from taxation. . . . Among the laws to which the plaintiff as a citizen became subject were those in respect to taxation. His property, unless exempt, became subject to taxation in the same manner as property belonging to other citizens, and the rule of exemption for him must be the same as for other citizens – that is, that no exemption exists by implication but must be clearly manifested.

Id. at 149. Relying on this reasoning, the United States Supreme Court in *Yakima County* held that lands originally allotted to Yakima Indians pursuant to the General

Allotment Act of 1887, also known as the Dawes Act, ch. 119, 24 Stat. 388, codified in part as amended at 25 U.S.C. § 331, and which were subsequently held by individual Indians and the tribe in fee simple were subject to county ad valorem taxation. The *Yakima County* Court specifically held that

when § 5 [of the General Allotment Act] rendered the allotted lands alienable and encumberable, it also rendered them subject to assessment and forced sale for taxes.

507 U.S. at 263-64.

In *Lummi Indian Tribe v. Whatcom County, Wash.*, 5 F.3d 1355 (9th Cir. 1993), cert. denied, 114 S. Ct. 2727 (1994), the Ninth Circuit accepted this clear pronouncement by the Supreme Court that alienability of land allowed taxation of the land, and held that:

The logic propounded by the *Goudy* Court and approved by *Yakima Nation* requires an Indian, even though he receives his property by treaty, to accept the burden as well as the benefits of land ownership. This proposition may be hard to square with the requirement, recently approved by the *Yakima Nation* Court, that Congress' intent to authorize state taxation of Indians must be unmistakably clear. The strength of the language in *Yakima Nation*, however, makes virtually inescapable the conclusion that the Lummi land is taxable if it is alienable.

Id. at 1358 (allowing county taxation of alienable land held by tribe). But see *United States on Behalf of Saginaw Chippewa Tribe v. Michigan*, 1997 FED App. 0026P (6th Cir. Jan. 22, 1997) (rejecting *Lummi* court's interpretation of

Yakima County and holding that alienability does not necessarily allow taxation).

Rather than accept the clear rule propounded by the *Yakima County* Court that alienability allows taxation, the majority declares that the homestead lands and pine lands in this case are exempt from taxation, and engages in a strained analysis of the *Yakima County* decision that eviscerates its holding. For example, because the *Yakima County* Court supported its conclusion that the land in question was taxable by noting that "[t]he Burke Act proviso, enacted in 1906, made this implication of § 5 explicit, and its nature more clear," 507 U.S. at 264, the majority concludes that the Burke Act analysis was necessary to the *Yakima County* Court's conclusion.¹⁵ See Maj. Op. at 12-13. The majority insists that § 5's grant of alienability did not allow taxation, asserting that "[n]o court has taken the position that an implication alone is sufficient to provide unmistakably clear congressional

¹⁵ It is clear that the *Yakima County* Court's analysis of the Burke Act was nothing more than additional support for its holding that alienability resulted in taxability. As the Court stated:

[T]he [Burke Act] proviso reaffirmed for such "prematurely" patented land what § 5 of the General Allotment Act implied with respect to patented land generally: subjection to state real estate taxes.

Yakima County, 507 U.S. at 264 (emphasis added). I note that, as a matter of plain logic, a "reaffirmation" supports, rather than controls, a conclusion. In addition, rather than being limited by the Burke Act's provision for the taxation of only prematurely patented land, the *Yakima County* Court allowed taxation over all land allotted under the General Allotment Act. See *id.* at 270.

intent to allow state taxation. . . . " *Id.* at 13. This statement simply disregards the *Yakima County* Court's treatment of § 5, and is strongly reminiscent of the *Yakima County* dissent:

The majority concedes that § 5 only "implied" this conclusion. In my view, a "mere implication" falls far short of the "unmistakably clear" intent standard.

507 U.S. at 273 (Blackmun, J., dissenting) (citations omitted).¹⁶

While I can understand the majority's disinclination to accept *Yakima County's* holding, it is nevertheless binding precedent, and should have been followed in this case. Under the clear language of *Yakima County*, alienability of land allows taxation of land. Because all of the lands in this case are fully alienable by the Band,¹⁷ the

¹⁶ In reaching its decision to disregard *Yakima County's* clear holding, the majority also relies on the *Yakima County* Court's remand for a factual determination of "whether the parcels at issue in these cases were patented under the General Allotment Act, rather than under some other statutes in force prior to the Indian Reorganization Act," and the legal determination of "whether it makes any difference." 502 U.S. at 270. I suggest that this remand was either an effort to avoid creating needless dicta, or a reference to the unusual situation noted in *Goudy*, where Congress could explicitly exempt land from taxation, despite making it alienable. See *Goudy*, 203 U.S. at 149. In any event, I do not believe that the remand, particularly considering the phrasing of "whether it makes any difference," can override the clear statement that a statute making land alienable also makes it taxable.

¹⁷ Before both the district court and this appellate panel, the Band argued that the Non-intercourse Act, 25 U.S.C. § 177,

district court properly followed the Supreme Court's clear holding in *Yakima County* and held that the lands are subject to taxation by the County.

I agree with the majority's conclusion in section III of its opinion that the lands originally allotted to Indians are taxable by the County. I disagree, however, with its conclusion that the pine lands and homestead parcel are not. Accordingly, I would affirm the district court's judgment in its entirety.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

limited the alienability of all lands held by an Indian tribe, including recently acquired lands held in fee simple. The district court rejected this argument, see Order at 14, as have most courts which have considered it. See, e.g., *Lummi Indian Tribe v. Whatcom County, Wash.*, 5 F.3d 1355, 1359 (9th Cir. 1993) ("No court has held that Indian land approved for alienation by the federal government and then reacquired by a tribe again becomes inalienable. To the contrary, courts have said that once Congress removes restraints on alienation of land, the protections of the Non-intercourse Act no longer apply. Moreover, the statutory authorization for the sale of Indian land following proper government approval makes no mention of reimposing restrictions should a tribe reacquire the land. Rather, the broad statutory language suggests that, once sold, the land becomes forever alienable." (citations omitted)), cert. denied, 114 S. Ct. 2727 (1994). The majority has declined to consider this issue. See Maj. Op. at 12 n.8.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

LEECH LAKE BAND OF
CHIPPEWA INDIANS,

Plaintiffs,

v.

CASS COUNTY, MINNESOTA and,
in their official capacities,
SHARON K. ANDERSON, CASS
COUNTY AUDITOR; MARGE L.
DANIELS, CASS COUNTY
TREASURER; STEVE KUHA, CASS
COUNTY ASSESSOR; and JOHN
STRANNE, JAMES DEMGEN,
GLENN WITHAM, ERWIN
OSTLUND and VIRGIL FOSTER,
CASS COUNTY COMMISSIONERS,

Defendants.

5-95 CIV 99

ORDER

(Filed
Dec. 6, 1995)

Jacobson, Buffalo, Schoessler & Magnuson, Ltd., by
JAMES M. SCHOESSLER, Minneapolis, Minnesota,
appeared on behalf of Leech Lake Band of Chippewa
Indians.

Earl E. Maus, Cass County Attorney, by EARL E. MAUS,
Walker, Minnesota, appeared on behalf of Cass County.

Cannon, Kunz & Fischer, by PETER W. CANNON,
Mahnomen, MN, for amicus curiae White Earth Band of
Chippewa Indians.

Department of Justice, by JUDITH RABINOWITZ, Wash-
ington, D.C., for amicus curiae United States of America.

This matter comes before the Court on Plaintiff Leech Lake Band of Chippewa Indians' motion for summary judgment. The Leech Lake Band of Chippewa Indians (hereinafter the "Band") argues that the ad valorem tax recently imposed by Cass County on land owned by the Band violates principles of Native American sovereignty and is impermissible under existing case law. Cass County argues that, pursuant to recent United States Supreme Court precedent, taxation of these lands is proper. The Court has determined, and all parties have agreed, there are no factual disputes, the issue presented is solely one of law, and the case is ripe for summary disposition. Pursuant to *Burlington Northern R.R. v. Omaha Public Power District*, 888 F.2d 1228 (8th Cir. 1989), the Court now decides this issue on summary judgment.¹

¹ In *Burlington Northern*, the 8th Circuit rejected the argument that a grant of summary judgment for the non-moving party was improper. "It is within the court's power to grant summary judgment sua sponte against the moving party, lacking a cross motion, where the party against whom the judgment is entered has had a full and fair opportunity to contest that there are no genuine issues of material fact to be tried and the party granted judgment is entitled to it as a matter of law. *Burlington Northern R.R. v. Omaha Public Power District*, 888 F.2d at 1231, n. 3. Because both parties agree there are no disputed facts, this is purely an issue of law, and the case is ripe for summary judgment, the Court is convinced both parties have had a full and fair opportunity to contest the appropriateness of summary judgment. Although defendants

I. BACKGROUND

A. Factual History

The Leech Lake Band of Chippewa Indians is a federally recognized Indian Tribe. The land currently recognized as the Leech Lake Reservation (hereinafter the "Reservation") was initially established by the Treaty of February 22, 1855, 10 Stat. 1165. Three reservations were created by the Treaty of 1855 but were subsequently augmented and connected by treaties with the Mississippi Bands of Chippewa dated May 7, 1864, 13 Stat. 693, and March 19, 1867, 16 Stat. 719. Executive Orders in 1873 and 1874 further enlarged the land constituting the Reservation which continues to exist within the same boundaries notwithstanding the patenting of land to individuals.²

In 1889 Congress passed the Nelson Act, pursuant to which the United States conveyed millions of acres of land in Leech Lake and other Chippewa reservations in Minnesota to individual Indians and non-Indians. Act of January 14, 1889, ch. 24, 25 Stat. 642. The Nelson Act took effect in 1890 after agreement was reached with Minnesota's Chippewa Indian population and approved by the President. See Folwell, *supra* note 1, at 219-235. Three

have not moved for summary judgment, all parties agreed at oral argument that summary disposition is appropriate.

² Folwell, A History of Minnesota 196 (revised ed. 1956); Royce, Indian Land Cessions in the United States 866, 874 (1899). Most of the history and facts underlying this matter are derived from the Band's well-articulated factual summary submitted in its Memorandum in Support of Summary Judgment.

different methods of conveyance in the Nelson Act are relevant to this lawsuit: §3 allotments, pine land sales, and homestead sales. Under §3, the Nelson Act provided that allotments to individual Indians were to be made "in conformity with the act of February eighth, eighteen hundred and eighty-seven, entitled 'An act for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes. . . .'" This reference is to the General Allotment Act of 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §331 *et seq.*) (hereinafter "GAA"). Conveyance procedures for both pine lands and homestead lands are enumerated in the Nelson Act but do not incorporate or make reference to the GAA. Thirteen of the land parcels at issue were initially allotted to individual Indians under §3, seven were originally sold pursuant to the pine land sales provisions (§§4 and 5 Nelson Act), and one was sold pursuant to the homestead provision (§6 Nelson Act). The land at issue has been bought and sold since the original issuance of fee patents under the Nelson Act and was re-acquired by the Band between 1980 and the present.

Prior to 1993, the land at issue had not been taxed. However, beginning with the 1993 tax year, Cass County began assessing taxes on all of the properties involved. The Band protested the taxes and, after refusing to pay, the Band began to receive delinquent tax notices. The Band eventually paid the taxes on all of the properties and, as of July 1, 1995, had paid Cass County more than \$64,000 in taxes, interest, and penalties. The Band seeks: a

declaration that the land at issue is not subject to property taxes imposed by Cass County; a refund of all monies paid for taxes, interest and penalties on the properties; an injunction against Cass County and its administrators prohibiting future taxation of this and similarly situated property and ordering the removal of the properties from the Cass County list of properties subject to taxation.

B. Legal History

In *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), Chief Justice Marshall's premise was that the "several Indian nations [constitute] distinct political communities, having territorial boundaries, within which their authority is exclusive. . . ." *Id.* at 556-57. Justice Marshall and the *Worcester* Court determined it was the national government, and not the states, that would negotiate and interact with the Indian tribes and bands. *Id.* at 557. Although the "platonic notions of Indian sovereignty" no longer stand on their own, in the taxation context, "'absent cession of jurisdiction or other federal statutes permitting it,' . . . a State is without power to tax reservation lands and reservations [sic] Indians." *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 257-58 (1992) (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973)). Further, as the *Yakima* Court recognized, United States Supreme Court precedent indicates a "consistent practice of declining to find that Congress has authorized state taxation unless it has 'made its intention to do so unmistakably

clear.'" *County of Yakima*, 502 U.S. at 258 (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985)).³ These principles of Indian sovereignty are the backdrop for the United States Supreme Court decision in *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992). Because the Court finds the *Yakima* decision controlling, the Court's decision hinges on the interpretation and application of *Yakima*.

II. DISCUSSION

A. The Yakima Decision

In 1992, the United States Supreme Court addressed the question of whether the GAA, as amended by the Burke Act of 1906, authorized states to tax land originally allotted to individual Indians and currently owned by either individual Indians or the Indian Tribe or Band. The Supreme Court held that such land is subject to taxation by the State of Washington because Congress deemed it fully alienable.

The Yakima Indian Reservation was established by Treaty in 1855. See Treaty between the United States and Yakima Nation of Indians. 12 Stat. 951. Some of the Reservation land was owned in fee as a result of allotments made pursuant to the GAA. Under the GAA, land was to be allotted to individual Indians but held in trust by the United States government for 25 years. Accordingly, the

³ A more complete legal history of state taxation of Indian reservations is contained in *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 257-59 (1992).

land held in trust was not alienable nor encumberable and, upon expiration of the 25 year trust period, the land would be conveyed to the individual Indian in fee. *Yakima*, 502 U.S. at 254; GAA §5. The original §6 of the GAA provided that "each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside." 24 Stat. 390.

In reaction to *In re Heff*, 197 U.S. 488 (1905), in which the Supreme Court held that §6 subjected Indian allottees to plenary state jurisdiction, Congress passed the Burke Act of 1906, 34 Stat. 182 (1983) (codified at 25 U.S.C. §349) (hereinafter the "Burke Act Proviso"). The Burke Act Proviso amended §6 of the GAA to provide that state criminal and civil jurisdiction would lie "[a]t the expiration of the trust period . . . when the lands have been conveyed to the Indians by patent in fee." It further gave the President the authority to prematurely terminate the trust period by prematurely patenting the land. Upon premature patenting and conveyance in fee to individual Indians, the Burke Act Proviso provided that "all restrictions as to sale, incumbrance, or taxation of said land shall be removed." 34 Stat. 183.

In holding the Yakima Nation land subject to state taxation, the Supreme Court discussed §§5 and 6 of the GAA and its prior decision in *Goudy v. Meath*, 203 U.S. 146 (1906). However, it appears the Court relied on §5 and the *Goudy* decision. In *Goudy*, the Supreme Court held that an Indian who was himself an allottee of land under the Treaty of December 26, 1854, 10 Stat. at L. 1132, was personally liable for property taxes assessed by the

State of Washington. *Goudy*, 203 U.S. at 150. According to the *Yakima* court, it was alienability of the Indian land in *Goudy* which rendered it subject to taxation. *Yakima*, 502 U.S. at 263. In *Yakima*, the court held that alienability was a consequence of §5 of the GAA and, as a result, "when §5 rendered the allotted lands alienable and encumberable, it also rendered them subject to assessment and forced sale for taxes." *Id.* at 263-64. Despite the Supreme Court's general rule that state taxation of Indian land requires that Congress make its intent to authorize state taxation unmistakably clear, the strong language of the *Yakima* decision leads the Court to the inescapable conclusion that, if Congress has made Indian land freely alienable, states may tax the land (hereinafter referred to as the "alienability equals taxability" rule).

The Court recognizes that the *Yakima* decision is complex and is open to conflicting interpretations. Despite relying on the *Goudy* decision and espousal of the alienability equals taxability rule, the *Yakima* court discussed §5 and the implications of the amendment to §6 via the Burke Act Proviso. The Burke Act Proviso provides, inter alia, that prematurely patented land would be free of "all restrictions as to sale, incumbrance or taxation." 25 U.S.C. §349. The *Yakima* court stated that "the proviso reaffirmed for such 'prematurely' patented land what §5 of the GAA implied with respect to patented land generally: subjection to state real estate taxes." *Yakima*, 502 U.S. at 264. It is difficult to reconcile the *Yakima* court's statement that Congress must clearly manifest its intent to allow taxation with the statement that §5 merely "implied" subjection to real estate taxes. The only conclusion this Court can draw is that alienation is the touchstone. It appears

that for the *Yakima* Court, §6, as amended, merely reaffirmed its holding that Congress's designation of the GAA land as alienable deemed it taxable. *Id.* at 263-64.

B. Other Decisions

Three other courts have addressed the issue of whether *Yakima* stands for the proposition that alienability equals taxability. *Lummi Indian Tribe v. Whatcom County, Washington*, 5 F.3d 1355 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 2727 (1994); *United States ex rel. Saginaw Chippewa Tribe v. Michigan*, 882 F.Supp. 659 (E.D.Mich. 1995); *Southern Ute Indian Tribe v. Board of County Commissioners of the County of La Plata, State of Colorado*, 855 F.Supp. 1194 (D.Colo. 1994), *vacated*, 61 F.3d 916 (10th Cir. 1995). Both the *Lummi* and *United States v. Michigan* courts held that, under *Yakima*, alienability equals taxability. In *Southern Ute*, however, the court rejected the notion that, under *Yakima*, alienability equals taxability. The *Southern Ute* decision was not, however, completely at odds with the present Court's decision.⁴

In *Lummi Indian Tribe v. Whatcom County, Washington*, 5 F.3d 1355 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 2727 (1994), the Ninth Circuit held that, pursuant to the *Yakima* decision, alienability equals taxability and accordingly land conveyed by treaty to the Lummi Indian Tribe is

⁴ The *Southern Ute* decision was vacated by the 10th Circuit on ripeness grounds.

taxable because it is freely alienable.⁵ *Id.* at 1358. The *Lummi* court also struggled with the apparent discord between the rule that state taxation of Indian land requires unmistakably clear expression of Congressional intent and the holding in *Yakima* that, if land is alienable, it is taxable. Due to the strength of the language in the *Yakima* decision, however, the court held that because the *Lummi* land is alienable, it is taxable. *Id.* at 1358.

In *United States ex rel. Saginaw Chippewa Tribe v. Michigan*, 882 F.Supp. 659 (E.D.Mich. 1995), the court held that land owned by the Saginaw Chippewa Tribe, patented pursuant to treaty and held in unrestricted fee simple was taxable by the State of Michigan. The *United States v. Michigan* court agreed with the *Lummi* court's interpretation of *Yakima*. "If land is subject to alienation, then it is subject to taxes." *United States v. Michigan*, 882 F.Supp. at 677.

One court has disagreed with the view that, under *Yakima*, alienability equals taxability. *Southern Ute Indian Tribe v. Board of County Commissioners of LaPlata, State of Colorado*, 855 F.Supp. 1194 (1994), *vacated*, 61 F.3d 916 (10th Cir. 1995). In *Southern Ute*, the land at issue was held by the tribe in fee and was originally patented under the Act of June 15, 1880, ch. 223, 21 Stat. 199 ("Act of 1880"), as supplemented by the Act of February 20, 1895, ch. 113, 28 Stat. 677 ("Act of 1895"). *Id.* at 1200-01. Under the Act of 1880, Congress provided that patents in fee simple would be issued to Indians once "the necessary

⁵ The lands at issue in both the *Lummi* and *United States v. Michigan* cases were not patented or allotted pursuant to the GAA.

laws are passed by Congress." *Id.* at 1200. The Act of 1880 further provided that:

The title to be acquired by the Indians shall not be subject to alienation, lease, or incumbrance, either by voluntary conveyance of the grantee or by the judgment, order, or decree of any court, or subject to taxation of any character, but shall be and remain inalienable and not subject to taxation for the period of twenty-five years, and until such time thereafter as the President of the United States may see fit to remove the restriction. . . . *Id.* at 1200-01.

Thus, pursuant to the Act of 1880, there are three prerequisites to the taxation of allotted land: (1) Congress must enact "the necessary laws" to accomplish the allotment; (2) the twenty-five year trust period must expire; and (3) the President must act to remove the restriction on alienation and taxation. *Southern Ute*, 855 F.Supp. at 1201. By the Act of 1895, Congress initiated the patenting process. The other two pre-requisites had not been met before Congress passed the Indian Reorganization Act ("IRA"), 25 U.S.C. §§461-479 (1934). Under the IRA, "existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress." 25 U.S.C. §462.

Accordingly, the land at issue was still subject to the trust restrictions. *Id.* at 1201-02.

According to the *Southern Ute* court, the fact that land is alienable does not necessarily lead to the conclusion that it is taxable. Instead, *Yakima* stood for the proposition that alienability is merely indicia of Congress's intent and

§ 5 of the GAA, by providing for alienability, sufficiently indicated Congress's intent to allow taxation. *Southern Ute*, 855 F.Supp. at 1200. This result is unpersuasive in the situation at hand for two reasons. First, the *Southern Ute* court's interpretation of *Yakima* minimizes the statement that "when § 5 rendered the allotted lands alienable and encumberable, it also rendered them subject to assessment and forced sale for taxes." *Yakima*, 502 U.S. at 263-64. *Southern Ute* held that alienability is merely indicia of Congress's intent to authorize state taxation of Indian land. This language indicates that alienability is not merely indicia of Congress's intent to authorize taxation but is, in fact, the touchstone for taxability. Second, *Southern Ute* is distinguishable from the situation at hand in that the statute involved in *Southern Ute*, the Act of 1880, specifically deemed the land inalienable. *Southern Ute*, 855 F.Supp. at 1202. The case at hand involves land patented pursuant to the Nelson Act, which incorporated the GAA. The GAA clearly made § 3 land alienable.

C. The Case at Hand

The only remaining issue is whether or not the land in this case is alienable. Defendant Cass County argues the land is freely alienable. Plaintiff Band argues the land is not freely alienable under the Indian Nonintercourse

Act. 25 U.S.C. § 177 (1983).⁶ The Indian Nonintercourse Act ("Nonintercourse Act") provides that: "No purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." 25 U.S.C. § 177. Because the land is not alienable, plaintiff argues, it is not taxable.

Both at *Lummi* and the *United States v. Michigan* courts rejected the same argument *Lummi*, 5 F.3d at 1358-59; *United States v. Michigan*, 882 F.Supp. at 674. As the *Lummi* court pointed out, no court has held that land made alienable by Congress becomes inalienable when reacquired by Indians. *Lummi*, 5 F.3d at 1359. In fact, the Supreme Court has impliedly held the protections of the Nonintercourse Act no longer apply once Congress removes restraints on alienation. See *Larkin v. Paugh*, 276 U.S. 431, 433-34, 439 (1928). In *Larkin v. Paugh*, the Supreme Court held that once the trust period expires and the patent is issued on the GAA land, the incidental restriction against alienation is terminated. "This put an end to the authority theretofore possessed by the Secretary of the Interior by reason of the trust and restriction - so that thereafter all questions pertaining to the title were subject to examination and determination by the courts. . . ." *Id.* at 439.

⁶ The Band also argues that, because the land is not alienable and Congressional approval is required in order to accomplish a transfer, Cass County may not foreclose on the land. Further, because foreclosure is not allowed, neither is taxation. This argument fails for the same reason - the land is freely alienable.

Plaintiff Band cites numerous cases in support of the argument that the Nonintercourse Act makes all Indian land inalienable. See *United States v. Sandoval*, 231 U.S. 28 (1913); *United States v. Candelaria*, 271 U.S. 432 (1926). Although it is clear from these and other cases cited by the Band that the Nonintercourse Act initially applies to all tribal lands, it is not clear whether land sold pursuant to Congressional authorization making the land freely alienable becomes inalienable if later reacquired by a tribe or individual Indian. In *United States v. Sandoval*, the court merely held that Congress has the power to legislate concerning fee lands held by Indians. 231 U.S. at 48. In *United States v. Candelaria*, the court held that the Nonintercourse Act applies to Pueblo Indian lands when they are initially acquired and therefore operates as a restriction on alienation for the Pueblo lands at issue. 271 U.S. at 442.

Plaintiff also cites *Alonzo v. United States*, 249 F.2d 189 (1957), *cert. denied*, 355 U.S. 940 (1958), for the proposition that tribal fee lands are protected by the Nonintercourse Act regardless of how they were acquired. *Id.* at 196. The court finds the *Alonzo* case unpersuasive in the situation at hand for numerous reasons. First, the *Alonzo* court's rationale for holding that the Nonintercourse Act restricts alienation regardless of how the land was acquired is outdated and unacceptable to the court. "[T]he reason for the imposition of the restrictions is in nowise [sic] related to the manner in which the Indians acquired their lands. The purpose of restrictions is to protect the Indians, 'a simple, uninformed people, ill-prepared to cope with the intelligence and greed of other races'. . . ." *Id.* at 196.

Second, the *Alonzo* case relied heavily on other statutory provisions in holding the land inalienable. The court stated: "But if we be wrong in our conclusion, which we do not concede, that the Enabling Act did not by implication remove restrictions with respect to lands acquired by the Pueblos by purchase, such restrictions were clearly reimposed by § 17 of the Act of 1924. . . ." *Id.* at 196. The court held the Nonintercourse Act initially imposed restrictions on alienation which were not removed by the Enabling Act. Section 17 of the Act of 1924, however, in clear and unquestionable language, restricted the alienation of the land at issue in *Alonzo*:

No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico . . . and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim there-to . . . shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior. *Id.* at 195.

Of utmost importance is that the land at issue in *Alonzo* was never made freely alienable by Congress. The New Mexico, Arizona Enabling Act, 36 Stat. 557-59, the only statute which arguably affects the alienability of the land in *Alonzo*, reads:

That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to . . . all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and

remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States. . . .

The *Alonzo* court held this provision did not eradicate the effects of the Nonintercourse Act and thus the land remained inalienable. *Id.* at 196. This result is not surprising as nothing in the Enabling Act even remotely appears to make the land alienable. In the case at hand, however, the land at issue was patented pursuant to the GAA and Nelson Act which clearly establish the free alienability of the land. There is also no provision such as § 17 of the Act of 1924 which reestablishes the inalienability of the land. Accordingly, the result in *Alonzo* is unpersuasive.

The inapplicability of the Nonintercourse Act in the situation at hand is further evidenced by the elements required for a cause of action under the Nonintercourse Act. Element three requires that "the United States has never approved or consented to the alienation of the tribal land." *Catawba Indian Tribe v. South Carolina*, 718 F.2d 1291, 1295 (4th Cir. 1983), *rev'd on other grounds*, 476 U.S. 498 (1986); *Epps v. Andrus*, 611 F.2d 915, 917 (1st Cir. 1979); *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 56 (2nd Cir. 1994).⁷ The logical conclusion is that once Congress has approved the alienation of a certain

⁷ The four elements are: (1) that it is or represents an Indian tribe within the meaning of the Nonintercourse Act; (2) that the land in issue is covered by the Nonintercourse Act as tribal land; (3) that the United States has never approved or consented to the alienation of the tribal land; (4) that the trust relationship between the United States and the tribe, established by coverage of the Nonintercourse Act, has never been terminated or abandoned. *Catawba Indian Tribe*, 718 F.2d at 1295.

piece of land, the protections of the Nonintercourse Act no longer apply.

The land here at issue was originally patented pursuant to the GAA. Congress provided that, upon the expiration of the 25 year trust period or upon premature termination of the trust period, the land would be conveyed to the individual Indian in fee, free of encumbrances and completely alienable. The land was sold by the Indians at some point in time after 1905 and reacquired between 1980 and the present. There were no restrictions on the initial sale of this land. Once Congress deemed the land alienable under the GAA and Nelson Act, it remained so, even when re-acquired by the Band. Because the land remains freely alienable, it is taxable.

D. Alternative Grounds

Even if the Supreme Court's decision in *Yakima* does not stand for the proposition that alienability equals taxability and instead merely reiterates the rule that Congress must clearly express its intent to authorize taxation of tribal fee lands, the majority of the land in the instant case would be taxable. Regardless of the rule of law resulting from *Yakima*, on the facts *Yakima* held that land patented pursuant to the GAA, as amended by the Burke Act Proviso, and held in fee by either individual Indians or the Indian Tribe or Band is taxable.

The land at issue was patented and allotted pursuant to the Nelson Act. The procedure utilized for patenting and allotting the majority of the land – § 3 land – incorporated the GAA. Section 3 of the Nelson Act provided that allotments to individual Indians were to be made "in

conformity with the act of February eighth, eighteen hundred and eighty-seven, entitled 'An act for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes. . . . ' " (GAA). Because § 3 of the Nelson Act incorporates the GAA, all of the land patented pursuant to § 3 would be taxable under this alternative reading of *Yakima*.

The Band argues that because the Nelson Act was enacted in 1889, and the amendment to § 6 of the GAA, the Burke Act Proviso, was enacted in 1906, Congress did not intend that the Nelson Act incorporate the Burke Act Proviso. Further, the Band argues, because the *Yakima* court relied on § 6, the Burke Act Proviso, in holding that Congress had clearly expressed its intent, the case at hand is completely distinguishable from *Yakima*.

Although the Burke Act Proviso makes no reference to the Nelson Act in amending the GAA, the Court is of the opinion that, when incorporating the GAA, the Nelson Act intended to incorporate the GAA patenting procedures and not merely the wording contained in the GAA as it read in 1887. The Burke Act Proviso merely clarified the operation of § 5 and added a premature patenting procedure to § 6. It is reasonable to conclude that Congress intended the Burke Act Proviso to apply to all land patenting procedures which incorporate the GAA.

In addition, it is not clear from the *Yakima* decision whether the Supreme Court felt § 6, as amended by the Burke Act, was significant in determining Congress's

intent. In fact, just the opposite appears to be true. Footnote 4 states:

Since the proviso is nothing more than an acknowledgment (and clarification) of the operation of § 5 with respect to all fee patented land, it is inconsequential that the trial record does not reflect "which (if any) of the parcels owned in fee by the Yakima Nation or individual members originally passed into fee status pursuant to the proviso, rather than at the expiration of the trust period. . . . *Yakima*, 502 U.S. at 264.

The Court also stated: "In other words, the [Burke Act] proviso reaffirmed for such 'prematurely' patented land what § 5 of the General Allotment Act implied with respect to patented land generally: subjection to state real estate taxes." *Id.* at 264. The Supreme Court viewed the Burke Act Proviso as an acknowledgment and reaffirmation of the alienability and taxability of the land. It is § 5 of the GAA which the Supreme Court relied on in finding GAA land taxable. Section 5 was part of the GAA as originally enacted in 1887 and thus was inarguably incorporated into § 3 of the Nelson Act. Accordingly, the thirteen land parcels originally patented under § 3 of the GAA are taxable.

The seven parcels originally sold under the pine land sale provisions (§§ 4 and 5 Nelson Act) and the one parcel originally sold pursuant to the homestead sales provision (§ 6 Nelson Act) would not be taxable, however, under this alternative holding. Although both pine land and homestead sales were provided for in the Nelson Act, they did not incorporate the GAA. Only § 3 of the Nelson Act incorporated the terms of the GAA.

III. CONCLUSION

In summary, the Court holds that, under *Yakima*, because all of the land at issue in this case is alienable, Cass County may assess and collect taxes on the § 3 land, pine land sale land, and homestead sale land. Because the land is taxable, Cass County has rightfully levied property taxes on the land since 1993 and may lawfully continue to levy property taxes on the land at issue.

Accordingly, upon review of the files, motions, and proceedings herein,

IT IS ORDERED that Plaintiff's motion for summary judgment is **DENIED**.

IT IS FURTHER ORDERED that the Clerk enter judgment as follows: **IT IS ORDERED ADJUDGED** and **DECREED** that this action is **DISMISSED**.

DATED: December 5, 1995.

/s/ Donald D. Alsop
DONALD D. ALSOP,
Senior Judge
United States
District Court

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-4263MND

Leech Lake Band of Chippewa Indians.	*	Order Denying
Appellant,	*	Petition for
vs.	*	Rehearing and
Cass County, Minnesota, et al.,	*	Suggestion for
Appellees.	*	Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

April 9, 1997

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION

Leech Lake Band of Chippewa Indians,	Civil. No. _____
Plaintiff,	COMPLAINT
v.	
Cass County, Minnesota and, in their official capacities, Sharon K. Anderson, Cass County Auditor; Marge L. Daniels, Cass County Treasurer; and Steve Kuha, Cass County Assessor; Kenneth Johnson, James Demgen, Robert Blair, Erwin Ostlund, and Virgil Foster, Cass County Commissioners,	
Defendants.	

The plaintiff, for its cause of action against the above-named defendants, alleges as follows:

NATURE OF THE COMPLAINT

1. this is a civil action for declaratory, injunctive, and monetary relief, brought by the Leech Lake Band of Chippewa Indians (hereafter, "Band") to protect Band-owned property from being subjected to Cass County ad valorem property taxes (hereafter, "property taxes"). It seeks an injunction preventing future taxation, a return of

past taxes paid by the Band under protest, and attorney fees and costs associated with the bringing of this action.

JURISDICTION

2. This action arises under the laws of the United States. This Court has jurisdiction under 28 U.S.C. § 1362; 28 U.S.C. § 1331; 28 U.S.C. § 2201; 28 U.S.C. § 2202; 25 U.S.C. § 177; 28 U.S.C. § 1343; and 42 U.S.C. § 1983. This action is brought by an Indian tribe to protect its rights under United States law as interpreted by the Supreme Court to be free from state and local governmental taxation, and to protect the civil rights of its enrolled members to be governed by their elected government free from unlawful interference by a state or local government. The action involves an actual controversy requiring federal judicial relief.

VENUE

3. Venue is properly in this Court pursuant to 28 U.S.C. § 1391(b) because the causes of action alleged herein arose in the District of Minnesota, and because the defendants reside in the District of Minnesota.

PARTIES

4. Plaintiff Leech Lake Band of Chippewa Indians is a federally recognized Indian tribe possessing powers of self-government over its members and its territory.

5. Defendant Sharon K. Anderson, Cass County Auditor, is the officer responsible for the accounting of

county property tax levies and receipts, and is responsible for acting on delinquent tax levies.

6. Defendant Marge L. Daniels, Cass County Treasurer, is the officer responsible for the collection of property taxes levied on taxable property within Cass County, Minnesota.

7. Defendant Steve Kuha, Cass County Assessor, is the officer responsible for the valuation assessment and levy of property taxes on taxable property within Cass County Minnesota.

8. Defendants Kenneth Johnson, James Demgen, Robert Blair, Erwin Ostlund, and Virgil Foster, Cass County Commissioners, are responsible for the overall administration of county laws and programs, including the laws and programs involved in this lawsuit.

STATEMENT OF THE CASE

9. The Band is located on and exercises sovereign governmental authority over a federally recognized reservation located in part in Cass County, Minnesota ("the Reservation"). The Reservation was initially created pursuant to the treaty of February 22, 1855, although the Reservation's boundaries were adjusted by various later treaties and executive orders. The history of the Reservation is further described in *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F.Supp. 1001 (D. Minn. 1971).

10. The Band in its governmental capacity owns or has owned the following land parcels in Cass County (hereafter, collectively referred to as "the Properties") in

fee simple, free of any trust ownership on the part of the United States:

- A. Portion of SW¹/₄SE¹/₄, Sec. 1, T.141N, R.31W.
- B. Lot 6, Block 10, Original Plat Cass Lake City, Sec.15, T.145N, R.31W.
- C. Lots 7 & 8, Block 10, Original Plat Cass City, Sec.15, T.145N, R.31W.
- D. Lots 21, 22, 22, & 24, Block 11, Original Plat Cass Lake City, Sec.14, T.145N, R.31W.
- E. Gov't Lot 3, Sec.20, T.144N, R.28W.
- F. Gov't Lot 4, Sec.20, T.144N, R.28W.
- G. NW¹/₄NE¹/₄, Sec.21, T.144N, R.28W.
- H. SW¹/₄NE¹/₄, Sec.21, T.144N, R.28W.
- I. SW¹/₄NW¹/₄, Sec.21, T.144N, R.28W.
- J. SE¹/₄NW¹/₄, Sec.21, T.144N, R.28W.
- K. NW¹/₄SW¹/₄, Sec.21, T.144N, R.28W.
- L. NW¹/₄SE¹/₄ less RY R/W, Sec.21, T.144N, R.28W.
- M. NE¹/₄SW¹/₄, Sec.21, T.144N, R.28W.
- N. Lot 28, Auditor's Plat #1, of Cass Lake City, Sec.15, T.145N, R.31W.
- O. Lots 26 & 27, Auditor's Plat #1, of Cass Lake City, Sec.15, T.145N, R.31W.
- P. North 86 feet of Lot 1, North 86 feet of Lot 2, Lots 3, 4, & 5, Block 16, Original Plat of Cass Lake City, Sec.15, T.145N, R.31W.
- Q. Lots 10, 11, & 12, Block 11, Original Plat of Cass Lake City, Sec.15, T.145N, R.31W.

- R. SE¹/₄NE¹/₄SE¹/₄, Sec.9, T.145N, R.31W.
- S. W¹/₂ Gov't. Lot 7, Sec.6, T.141N, R.30W.
- T. Portion of SE¹/₄SW¹/₄, Sec.21, T.145N, R.31W.
- U. Portion of E¹/₂SW¹/₄SE¹/₄, Sec.1, T.141N, R.31W.

11. The Properties are located within the boundaries of the Leech Lake Reservation, and are within Indian Country as defined by federal law.

12. The Band acquired the Properties by deed from private owners.

13. Cass County imposes property taxes on taxable real property located within the County.

14. Prior to 1993, Cass County did not as a matter of policy list property owned in fee by the Band as being subject to property taxes, and did not assess, levy, or collect property taxes thereon; except that the County did assess property taxes prior to 1993 against the parcels described in paragraph 10 above as "E" through "M".

15. On or about 1993, Cass County officials began to assess property taxes against the Properties owned in fee by the Band.

16. To date, the Band has paid property taxes, interest, and penalties under protest to Cass County in excess of \$64,000.00 on the Properties.

17. The Band paid the taxes referred to in paragraph 16 solely in order to avoid state court forfeiture proceedings, and in no way did the Band ever assent to the

jurisdiction of Cass County to impose property taxes on the Properties.

18. Since the imposition of property taxes on the Properties by Cass County, and the payment under protest by the Band of such taxes, the Band has transferred certain parcels to the United States to hold in trust. Such parcels are listed in paragraph 10 as A., B., C., D., N., P., Q., R., S., T., and U.

19. Indian Tribes are immune from taxation by states or political subdivisions of states unless Congress has specifically delegated such authority to the states or their political subdivisions.

20. There is no federal statute or other Congressional action which has granted jurisdiction to Cass County to impose property taxes against the Properties.

21. The imposition by the Defendants of property taxes against the Properties exceeds the State's power to tax as prescribed in Article X, Section 1 of the Constitution of the State of Minnesota as adopted on October 13, 1857, and amended and restructured on November 5, 1974.

22. The imposition by the Defendants of property taxes against the Properties violates Minnesota Statutes § 272.01, subds. 1 and 3.

23. The imposition by the Defendants of property taxes against the Properties has caused substantial and continuing harm to the Band by diverting needed governmental resources, reducing the Band's ability to re-establish its land base, and by limiting the ways which the Band can purchase and use land.

24. The imposition by the Defendants of property taxes against the Properties will cause the Band substantial harm in the future.

25. The imposition by the Defendants of property taxes against the Properties constitutes an unauthorized infringement on the federally recognized sovereignty of the Band.

26. The imposition by the Defendants of property taxes against the Properties constitutes a violation of the civil rights of the enrolled members of the Band.

27. The Band has demanded that the Defendants remove the Properties from its tax rolls, and refund to the Band all taxes, interest, and penalties paid by the Band, under protest, on the Properties.

28. The Defendants have refused the demand of the Band described in paragraph 27.

29. The Band has no adequate remedy at law for the actions of Defendants.

PRAYER FOR RELIEF

WHEREFORE, the Band respectfully prays for the following relief:

1. An Order declaring that the Properties described in paragraph 10 are not subject to property taxes imposed by Cass County.

2. An Order directing Defendants to remove the Properties from the Cass County list of properties subject to property taxes.

3. An Order preliminarily and permanently enjoining Defendants or their successors in office from taking any action to assess, levy, or collect property taxes with regard to the Properties, or with regard to any land which may in the future be acquired or held in fee by the Band within the Reservation.

4. An Order awarding the Band a refund of all property taxes, interest, and penalties paid by it to Cass County with regard to the Properties, with both prejudgment and postjudgment interest.

5. An Order awarding the Band all its attorneys fees and costs associated with bringing the present action.

6. An Order granting any further relief as the Court may deem appropriate and just under the circumstances.

Dated: June 2, 1995

JACOBSON, BUFFALO, SCHOESSLER
& MAGNUSON, LTD.

/s/ James M. Schoessler
By: James M. Schoessler
Atty. Regis. No. 97433
Steven G. Thorne
Atty. Regis. No. 109605
Joseph F. Halloran
Atty. Regis. No. 244132
810 Lumber Exchange Building
Ten South Fifth Street
Minneapolis, Minnesota 55402
Telephone: (612) 339-2071

ATTORNEYS FOR THE LEECH LAKE
BAND OF CHIPPEWA INDIANS

General Allotment Act of 1887, 24 Stat. 388, § 5 (in pertinent part) and § 6.

* * *

SEC. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefore in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period.

* * *

SEC. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law

or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians thereto, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

* * *

Nelson Act of 1889, 25 Stat. 642, §§ 3, 5 and 6.

* * *

SEC. 3. That as soon as the census has been taken, and the cession and relinquishment has been obtained, approved, and ratified, as specified in section one of this act, all of said Chippewa Indians in the State of Minnesota, except those on the Red Lake Reservation, shall, under the direction of said commissioners, be removed to and take up their residence on the White Earth Reservation, and thereupon there shall, as soon as practicable, under the direction of said commissioners, be allotted lands in severalty to the Red Lake Indians on Red Lake Reservation, and to all the other of said Indians on White Earth Reservation, in conformity with the act of February eighth, eighteen hundred and eighty-seven, entitled "An act for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes"; and all allotments heretofore made to any of said Indians on the White Earth Reservation are hereby ratified and confirmed with the like tenure and condition prescribed for all allotments under this act: *Provided, however,* That the amount heretofore allotted to any Indian on White Earth Reservation shall be deducted from the amount of allotment to which he or she is entitled under this act: *Provided further,* That any of the Indians residing on any of said reservations may, in his discretion, take his allotment in severalty under this act on the reservation where he lives at the time of the removal herein provided for is effected, instead of being removed to and taking such allotment on White Earth Reservation.

* * *

SEC. 5. That after the survey, examination, and appraisals of said pine lands has been fully completed they shall be proclaimed as in market and offered for sale in the following manner: The Commissioner of the General Land Office shall cause notices to be inserted once in each week for four successive weeks in one newspaper of general circulation published in Minneapolis, Saint Paul, Duluth, and Crookston. Minnesota; Chicago, Illinois; Milwaukee. Wisconsin; Detroit, Michigan; Philadelphia and Williamsport, Pennsylvania; and Boston. Massachusetts, of the sale of said lands at public auction to the highest bidder for each at the local land office of the district within which said lands are located, said notice to state the time and place and terms of such sale. At such sale said lands shall be offered in forty-acre parcels, except in case of fractions containing either more or less than forty acres, which shall be sold entire. In no event shall any parcel be sold for a less sum than its appraised value. The residue of such lands remaining unsold after such public offering shall thereafter be subject to private sale for cash at the appraised value of the same upon application at the local land office.

SEC. 6. That when any of the agricultural lands on said reservation not allotted under this act, nor reserved for the future use of said Indians have been surveyed, the Secretary of the Interior shall give thirty days' notice through at least one newspaper published at Saint Paul and Crookston, in the State of Minnesota, and, at the expiration of thirty days, the said agricultural lands so surveyed, shall be disposed of by the United States to actual settlers only under the provisions of the homestead

law: *Provided*, That each settler under and in accordance with the provisions of said homestead laws shall pay to the United States for the land so taken by him the sum of one dollar and twenty-five cents for each and every acre, in five equal annual payments, and shall be entitled to a patent therefor only at the expiration of five years from the date of entry, according to said homestead laws, and after the full payment of said one dollar and twenty-five cents per acre therefor, and due proof of occupancy for said period of five years; and any conveyance of said lands so taken as a homestead, or any contract touching the same, prior to the date of final entry, shall be null and void: *Provided*, That nothing in this act shall be held to authorize the sale or other disposal under its provision of any tract upon which there is a subsisting, valid, pre-emption or homestead entry, but any such entry shall be proceeded with under the regulations and decisions in force at the date of its allowance, and if found regular and valid, patents shall issue thereon: *Provided*, That any person who has not heretofore had the benefit of the homestead or pre-emption law, and who has failed from any cause to perfect the title to a tract of land heretofore entered by him under either of said laws may make a second homestead entry under the provisions of this act.

* * *

General Allotment Act, § 6, as amended by The Burke Act of 1906, 25 U.S.C. § 349 (in pertinent part).

At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, . . . then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside. . . . *Provided*, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed.

* * *

(2)

Supreme Court, U.S.
FILED
AUG 5 1997
CLERK

No. 97-174

In the
Supreme Court of the United States
October Term, 1997

CASS COUNTY, MINNESOTA; SHARON K.
ANDERSON, in her official capacity as Cass County
Auditor; MARGE L. DANIELS, in her official capacity as
Cass County Treasurer; STEVE KUHA, in his official
capacity as Cass County Assessor; JAMES DEMGEN, in
his official capacity as Cass County Commissioner;
JOHN STRANNE, in his official capacity as Cass County
Commissioner; GLEN WITHAM, in his official capacity as
Cass County Commissioner; ERWIN OSTLUND, in his
official capacity as Cass County Commissioner;
VIRGIL FOSTER, in his official capacity as
Cass County Commissioner,

Petitioners,

vs.

LEECH LAKE BAND OF CHIPPEWA INDIANS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

James M. Schoessler
Counsel of Record
Steven G. Thorne
Joseph F. Halloran
Jacobson, Buffalo, Schoessler
& Magnuson, Ltd.
Suite 810 Lumber Exchange Bldg.
10 South Fifth Street
Minneapolis, Minnesota 55402
(612) 339-2071
Counsel for Respondent

51 pp

QUESTIONS PRESENTED

1. Whether the free alienability of tribal government-owned land evidences unmistakably clear congressional intent to extinguish the tribal government's inherent immunity from state or local property taxation.

TABLE OF CONTENTS

QUESTION PRESENTED.....	i
TABLE OF AUTHORITIES	iii
JURISDICTION.....	1
STATUTORY PROVISIONS INVOLVED.....	1
STATEMENT OF THE CASE.....	2
REASONS FOR DENYING THE WRIT	2
1. This Case Is Unique To Its Own Facts And Statutes, And Does Not Merit Review By This Court.....	2
2. It Is Premature To Conclude That There Is An Irreconcilable Split Among Federal Circuits On Tribal Land Taxation Questions.....	4
3. The Decision Of The Court Of Appeals Follows The Opinion Of This Court In <u>Yakima</u>	6
CONCLUSION.....	9

TABLE OF AUTHORITIES

Cases

<u>Cotton Petroleum Corp. v. New Mexico</u> ,	9
490 U.S. 163 (1989)	
<u>County of Yakima v. Yakima Indian Nation</u> ,	<i>passim</i>
502 U.S. 251 (1992)	
<u>Estate of Cowart v. Nicklos Drilling Company</u> ,	8
505 U.S. 469 (1992)	
<u>Lummi Indian Tribe v. Whatcom County, Washington</u> ,	4, 5
5 F.3d 1355 (9th Cir. 1993)	
<u>McClanahan v. Arizona State Tax Comm'n</u> ,	9
411 U.S. 164 (1973)	
<u>Oklahoma Tax Comm'n v. Chickasaw Nation</u> ,.....	7
515 U.S. 450 (1995)	
<u>Oklahoma Tax Comm'n v. Sac and Fox Nation</u> ,	7
508 U.S. 114 (1993)	
<u>Southern Ute Indian Tribe v. Board of County Comm'rs</u> ,	6
855 F.Supp. 1194 (D.Colo. 1994), <i>vacated</i> , 61 F.3d 916 (10th Cir. 1995)	
<u>State v. Clark</u> ,.....	3
282 N.W.2d 902 (Minn. 1979)	
<u>United States on Behalf of the Saginaw Chippewa Tribe v. Michigan</u> , 106 F.3d 130 (6th Cir. 1997)	5, 6

Statutes

Act of March 3, 1891,	1
26 Stat. 1095	
Burke Act of 1906,	1, 7
34 Stat. 182	
General Allotment Act of 1887,	<i>passim</i>
24 Stat. 388	
Homestead Act of May 20, 1862,	1
12 Stat. 392	
Nelson Act of 1889,	<i>passim</i>
25 Stat. 642	
Nonintercourse Act,	1, 8, 9
25 U.S.C. § 177 (1996)	

Respondent Leech Lake Band of Chippewa Indians ("the Band") respectfully requests that this Court deny the Petition for Writ of Certiorari filed by Cass County ("the County"), seeking review of the decision of the Court of Appeals for the Eighth Circuit in this case. That decision is reported at 108 F.3d 820, and is printed in the County's Petition for Writ of Certiorari at App. 1-29. The decision of the District Court for the District of Minnesota is reported at 908 F. Supp. 689 and is printed in the County's Petition for Writ of Certiorari at App. 30-49.

JURISDICTION

The Court of Appeals for the Eighth Circuit entered its judgment on March 6, 1997, and entered its Order denying the County's petition for rehearing and suggestion for rehearing *en banc* on April 9, 1997.

The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1) (1996).

STATUTORY PROVISIONS INVOLVED

The Band accepts the Petition's identification of the Nelson Act of 1889 (25 Stat. 642); the General Allotment Act of 1887 (24 Stat. 388); and the Burke Act of 1906 (34 Stat. 182). However, those statutes were not included in the Appendix to the Petition. Hence, they are printed in the Appendix hereto. The Band hereby further identifies the Homestead Act of May 20, 1862 (12 Stat. 392), as amended by the Act of March 3, 1891 (26 Stat. 1095), and includes it in the Appendix hereto; and identifies the Nonintercourse Act (25 U.S.C. § 177 (1996)), which reads in relevant part as follows:

No purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution....

STATEMENT OF THE CASE

The Band adopts the Court of Appeals' description of this case as it appears in 108 F.3d at 821-824 and at App. 2-8 of the County's Petition; and the Band accepts the Statement of the County at pages 2-6 of the County's Petition as being generally accurate.

REASONS FOR DENYING THE WRIT

The Petition for Writ of Certiorari should be denied because 1) this case is unique to its facts, primarily involving a federal statute (the Nelson Act of 1889) that applied only to Minnesota; 2) it is premature for this Court to act because there is not yet an intractable difference among circuit courts, and the law may well develop consistently among the circuits in the future; and 3) the analysis of the Court of Appeals closely followed the holding and rationale of this Court's opinion in County of Yakima v. Yakima Indian Nation, 502 U.S. 251 (1992).

1. This Case Is Unique To Its Own Facts And Statutes, And Does Not Merit Review By This Court.

The decision by the Court of Appeals in this case was based on a federal statute that was unique to Minnesota, and that governed the disposal of Indian land only in Minnesota.

The decision's importance to the interpretation of other treaties and statutes is limited. As such, it is not a case of national federal importance, and thus is not appropriate for review under Supreme Court Rule 10.

The federal statute at the heart of this case is known as the Nelson Act of 1889 (25 Stat. 642). Even the title of the Nelson Act stated that it was "An act for the relief and civilization of the Chippewa Indians in the State of Minnesota." The Minnesota Supreme Court has described that Act as being "designed to concentrate Minnesota's Chippewa Indian population (except the Red Lake Band) on the White Earth Reservation and open up the other Chippewa reservations to white settlement...." State v. Clark, 282 N.W.2d 902, 905 (Minn. 1979).

Although the Nelson Act incorporated some of the processes of the more expansive General Allotment Act of 1887 (24 Stat. 388), its disposal mechanisms and categories in many respects were very different from the processes of the General Allotment Act, and were unique to land within Minnesota's borders. It was clear from the opinion below that the Court of Appeals recognized the uniqueness of the Nelson Act's disposal mechanisms. The court ultimately based part of its decision on that uniqueness:

The question in this case is whether the Nelson Act evinces an "unmistakably clear" congressional intent to allow an ad valorem tax on these parcels.

Eight of the 21 lots were sold as pine lands or distributed as homestead lands under § 4, § 5, or § 6 of the Nelson Act. These sections of the Act, unlike § 3, did not incorporate the GAA or include any mention of an intent to tax lands distributed under them which might become reacquired by the Band in fee. These parcels are therefore not subject to state taxation.

108 F.3d at 829, Petition App. at 21-22 (emphasis added).

Because this case involves a Minnesota-specific federal law, and because the analysis of the impact of that law depends on circumstances unique to Minnesota, the case does not fall within the scope of Supreme Court Rule 10, and is not appropriate for review. If law develops in the future in other circuits or this Court that has direct application to this case, the Minnesota federal courts are capable of re-analyzing the Nelson Act accordingly.

2. It Is Premature To Conclude That There Is An Irreconcilable Split Among Federal Circuits On Tribal Land Taxation Questions.

Although there is some indication of differing interpretations of tribal land taxation issues between the Ninth Circuit and two other circuits (the Eighth and Sixth), it is too early to conclude that such differences command this Court's attention. First, the instant case is unique factually, and so is not necessarily in direct conflict with decisions in any other circuit. Second, courts of appeals are just beginning to deal with the language of this Court's Yakima decision and the issues addressed in that case. In time, and without the need for immediate intervention by this Court, apparent disagreements among circuits may disappear.

At the moment, there is only one circuit court decision that could be construed as being at odds with the rationale of the Court of Appeals below. That decision appears in the Ninth Circuit case of Lummi Indian Tribe v. Whatcom County, Washington, 5 F.3d 1355 (9th Cir. 1993). Lummi was the first court of appeals decision after County of Yakima v. Yakima Indian Nation, 502 U.S. 251 (1992) to deal with land taxation issues similar to those addressed by Yakima. Lummi was not an *en banc* decision but was a 2-1 decision of

a panel, with Judge Beezer writing a dissenting opinion that is fully consistent with the Court of Appeals decision in this case. The existence of the Lummi decision does not require review here.

In one important respect, the Lummi holding is not even at odds with the holding of the Court of Appeals in the instant case. In Lummi, all of the disputed parcels originally were allotted to individual Indians pursuant to the General Allotment Act of 1887, and became fee property in much the same way as the land at issue in Yakima. The Court of Appeals below also acknowledged that lands originally allotted to individual Indians pursuant to the General Allotment Act of 1887--as in Yakima and Lummi--were taxable because of the presumed congressional intent with regard to the operation of that Act. However, the Court of Appeals could not find any congressional intent to allow taxation (or even any congressional reference to taxation) with regard to lands disposed of in Minnesota as pinelands or homesteads under sections 4, 5, and 6 of the Nelson Act, and not under the General Allotment Act. The Court of Appeals decision regarding the non-taxability of these lands does not necessarily conflict with the holding in Lummi because the Lummi court did not have the Nelson Act and the Minnesota statutory situation before it.

Additionally, as mentioned earlier, Lummi was the first circuit court to interpret the Yakima opinion. Since Lummi, the courts of appeals for the Sixth and Eighth Circuits also have examined Yakima's rationale. Each has read Yakima consistently with the other, and each has criticized some of Lummi's more exaggerated approaches. The Ninth Circuit, on its own, may well reconsider some of Lummi's statements in the future.

The Sixth Circuit, in the recent case of United States on Behalf of the Saginaw Chippewa Tribe v. Michigan, 106 F.3d 130 (6th Cir. 1997), used the same approach and rationale

used by the Eighth Circuit in this case. ("Thus, the Yakima decision, properly interpreted, does not alter the general rule requiring an 'unmistakably clear' expression by Congress to allow state taxation of Indian land. Congress has taken no such action with respect to the Indian lands in the instant case." 106 F.3d at 133.) Furthermore, the Tenth Circuit has had before it (but vacated on ripeness grounds) a case in which the district court also used the same reasoning as the Sixth and Eighth Circuits. Southern Ute Indian Tribe v. Board of County Comm'rs, 855 F.Supp. 1194 (D.Colo. 1994), *vacated*, 61 F.3d 916 (10th Cir. 1995). It may well happen that other courts of appeals and district courts will follow the rationale of the instant case and the Saginaw and Southern Ute cases, and the Ninth Circuit on its own will revise its analysis accordingly. In any event, the circuits should be given some time to analyze each others' approach to tribal land taxation issues and to reconcile perceived differences in their decisions. It is too early to conclude that there are irreconcilable differences among the circuits, and that those differences are serious and intractable enough to justify intervention by this Court.

3. The Decision Of The Court Of Appeals Follows The Opinion Of This Court In Yakima.

A further reason to deny review in this case is that the analysis of the Court of Appeals is consistent with the analysis of this Court in Yakima. As such, there is no conflict on an important federal question, and no justification for review under Supreme Court Rule 10.

The Court of Appeals took great pains to follow the logic and holdings of this Court's Yakima decision. In Yakima, this Court explicitly stated; "[O]ur cases reveal a consistent practice of declining to find that Congress has authorized state taxation unless it has 'made its intention to do so

unmistakably clear.'" 502 U.S. at 258. The Court of Appeals carefully repeated this rule, citing Yakima: "State taxation of Indian land is not authorized unless Congress 'has made its intention to do so unmistakably clear.'" 108 F.3d at 829, Petition App. at 21. The Court of Appeals applied the rule to the Nelson Act of 1889, and followed Yakima's interpretation of the General Allotment Act of 1887. ("Yakima held that after the addition of the Burke Act proviso, lands allotted under the GAA are subject to state ad valorem taxes when they are patented in fee." 108 F.3d at 829, Petition App. at 22.)

To the extent the Court of Appeals may have questioned the rationale for this Court's treatment of tribal government land (as opposed to individual land) in Yakima, it refused to allow such questions to interfere with its strict attention to the Yakima holding. ("The Band argues that the GAA itself does not evince an unmistakably clear intent to allow ad valorem taxes on tribally held land because §§ 5 and 6 of the GAA only address the allotment of land to individual Indians, but that argument cannot be reconciled with the holding of the Supreme Court in Yakima." 108 F.3d at 829, Petition App. at 22.)

The Court of Appeals thus was diligent in avoiding any conflict with this Court's ruling in Yakima. In the instant case, it is the County's legal position--not the Court of Appeals opinion--that stretches Yakima's wording and rationale beyond the breaking point.

The County would like this Court to adopt a shorthand legal rule that any time Indian land becomes freely alienable--by whatever statute or whatever means--the land automatically becomes taxable. Such a proposal is fundamentally at odds with the "unmistakable intent" rule expressly reaffirmed by this Court in Yakima, as well as in the later cases of Oklahoma Tax Comm'n v. Sac and Fox Nation, 508 U.S. 114 (1993) and Oklahoma Tax Comm'n v.

Chickasaw Nation, 515 U.S. 450 (1995). If Yakima had intended to create such an "alienability equals taxability" rule, the decision would have looked much different, and would have been a fraction of its length. The rule desired by the County does not follow the Yakima analysis, and it ignores that decision's repeated emphasis on the necessity of explicit congressional language as a prerequisite for finding Indian land subject to state and local taxation. The Court of Appeals, on the other hand, was diligent in following the specific holding and analysis of Yakima. Thus, the County is mistaken in arguing that its Petition must be granted because the Court of Appeals violated the dictates of Yakima.

However, if this Court chooses to grant the County's Petition on the basis of the "alienability equals taxability" argument, the Band will reassert the argument it made below (which was not ruled upon) that the federal Nonintercourse Act (25 U.S.C. § 177) restricts the free alienability of tribal governmental land. In other words, that Act prevents such land from being taxed on the basis of its supposed free alienability.

The language of 25 U.S.C. § 177 is not complicated. It says that land owned by a tribe cannot be conveyed without the consent of the federal government. The Act is a clear restraint on alienability and, as such, makes the application of any "alienability equals taxability" rule irrelevant to tribal governmental land. The statute applies to all tribal land, and it makes no distinctions based on how land came into tribal ownership.

A statute must be construed by courts in accordance with its plain language, "and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." Estate of Cowart v. Nicklos Drilling Company, 505 U.S. 469, 475 (1992). Section 177's plain wording, especially when coupled with the canons of construction for interpreting Indian-related

statutes (see Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 76-77 (1989); McClanahan v. Arizona State Tax Comm'n., 411 U.S. 164, 174-176 (1973)), must be construed as restricting free alienability, and certainly as preventing involuntary alienation of tribal on-reservation land by means of taxation and tax forfeitures. The Band desires to make clear that the Nonintercourse Act must inevitably become an issue if this Court decides to accept the County's petition. The failure of the Court of Appeals to rule upon or fully analyze this issue is another reason for this Court to deny review.

CONCLUSION

Because this case involves issues unique to one state; because it does not involve issues on which there is current irreconcilable conflict among the circuits; because the Court of Appeals below correctly followed the precedent of this Court; and for all the other reasons identified herein, the County's Petition for Writ of Certiorari should be denied.

Dated: August 5, 1997 Respectfully submitted,

James M. Schoessler
Counsel of Record
 Steven G. Thorne
 Joseph F. Halloran
 Jacobson, Buffalo, Schoessler
 & Magnuson, Ltd.
 Suite 810 Lumber Exchange Bldg.
 10 South Fifth Street
 Minneapolis, MN 55402
 Telephone: (612) 339-2071

Counsel for Respondent

INDEX TO APPENDIX

The Nelson Act of 1889,	A-1
25 Stat. 642	
The General Allotment Act of 1887,	A-9
24 Stat. 388	
The Burke Act of 1906,	A-16
34 Stat. 182	
The Homestead Act of 1862,	A-18
12 Stat. 392	
1891 Amendments to Homestead Act of 1862,	A-22
26 Stat. 1095	

The Nelson Act of 1889
25 Stat. 642

January 14, 1889.

CHAP. 24.—An act for the relief and civilization of the Chippewa Indians in the State of Minnesota.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the United States is hereby authorized and directed, within sixty days after the passage of this act, to designate and appoint three Commissioners, one of whom shall be a citizen of Minnesota, whose duty it shall be, as soon as practicable after their appointment, to negotiate with all the different bands or tribes of Chippewa Indians in the State of Minnesota for the complete cession and relinquishment in writing of all their title and interest in and to all the reservations of said Indians in the State of Minnesota, except the White Earth and Red Lake Reservations, and to all and so much of these two reservations as in the judgment of said commission is not required to make and fill the allotments required by this and existing acts, and shall not have been reserved by the Commissioners for said purposes, for the purposes and upon the terms hereinafter stated; and such cession and relinquishment shall be deemed sufficient as to each of said several reservations, except as to the Red Lake Reservation, if made and assented to in writing by two-thirds of the male adults over eighteen years of age of the band or tribe of Indians occupying and belonging to such reservations; and as to the Red Lake Reservation the cession and relinquishment shall be deemed sufficient if made and assented to in like manner by two-thirds of the male adults of all the Chippewa Indians in Minnesota; and provided that all agreements therefor shall be approved by the President of the

United States before taking effect: *Provided further*, That in any case where an allotment in severalty has heretofore been made to any Indian of land upon any of said reservations, he shall not be deprived thereof or disturbed therein except by his own individual consent separately and previously given, in such form and manner as may be prescribed by the Secretary of the Interior. And for the purpose of ascertaining whether the proper number of Indians yield and give their assent as aforesaid, and for the purpose of making the allotments and payments hereinafter mentioned, the said commissioners shall, while engaged in securing such cession and relinquishment as aforesaid and before completing the same, make an accurate census of each tribe or band, classifying them into male and female adults, and male and female minors; and the minors into those who are orphans and those who are not orphans, giving the exact numbers of each class, and making such census in duplicate lists, one of which shall be filed with the Secretary of the Interior, and the other with the official head of the band or tribe; and the acceptance and approval of such cession and relinquishment by the President of the United States shall, be deemed full and ample proof of the assent of the Indians, and shall operate as a complete extinguishment of the Indian title without any other or further act or ceremony whatsoever for the purposes and upon the terms in this act provided.

SEC. 2. That the said commissioners shall, before entering upon the discharge of their duties, each give a bond to the United States in the sum of ten thousand dollars, with sufficient sureties, to be approved by the Secretary of the Interior, and conditioned for the faithful discharge of their duties under this act, and they shall also each take an oath to support the Constitution of the United States, and to faithfully discharge the duties of their office, which bonds and oaths shall be filed with the Secretary of the Interior. Said commissioners shall be entitled to a compensation of ten

dollars per day for each day actually employed in the discharge of their duties, and for their actual traveling expenses and board, not exceeding three dollars per day. Said commissioners shall also be authorized to employ a competent interpreter while engaged in the performance of their duties, at a compensation and allowance to be fixed by them, not in excess of that allowed to each of them under this act.

SEC. 3. That as soon as the census has been taken, and the cession and relinquishment has been obtained, approved, and ratified, as specified in section one of this act, all of said Chippewa Indians in the State of Minnesota, except those on the Red Lake Reservation, shall, under the direction of said commissioners, be removed to and take up their residence on the White Earth Reservation, and thereupon, there shall, as soon as practicable, under the direction of said commissioners, be allotted lands in severalty to the Red Lake Indians on Red Lake Reservation, and to all the other of said Indians on White Earth Reservation, in conformity with the act of February eighth, eighteen hundred and eighty-seven, entitled "An act for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes"; and all allotments heretofore made to any of said Indians on the White Earth Reservation are hereby ratified and confirmed with the like tenure and condition prescribed for all allotments under this act: *Provided, however*, That the amount heretofore allotted to any Indian on White Earth Reservation shall be deducted from the amount of allotment to which he or she is entitled under this act: *Provided further*, That any of the Indians residing on any of said reservations may, in his discretion, take his allotment in severalty under this act on the reservation where he lives at the time of the removal herein provided for is

effected, instead of being removed to and taking such allotment on White Earth Reservation.

SEC. 4. That as soon as the cession and relinquishment of said Indian title has been obtained and approved as aforesaid, it shall be the duty of the Commissioners of the General Land Office to cause the lands so ceded to the United States to be surveyed in the manner provided by law for the survey of public lands, and as soon as practicable after such survey has been made, and the report, field-notes, and plats thereof filed in the General Land Office, and duly approved by the Commissioner thereof, the said Secretary of the Interior, upon notice of the completion of such surveys, shall appoint a sufficient number of competent and experienced examiners, in order that the work may be done within a reasonable time, who shall go upon said lands thus surveyed and personally make a careful, complete, and thorough examination of the same by forty-acre lots, for the purpose of ascertaining on which lots or tracts there is standing or growing pine timber, which tracts on which pine timber is standing or growing for the purposes of this act shall be termed "pine lands," the minutes of such examination to be at the time entered in books provided for that purpose, showing with particularity the amount and quality of all pine timber standing or growing on any lot or tract, the amount of such pine timber, to be estimated by feet in the manner usual in estimating such timber, which estimates and reports of all such examinations shall be filed with the Commissioner of the General Land Office as a part of the permanent records thereof, and thereupon that officer shall cause to be made a list of all such pine lands, describing each forty-acre lot or tract thereof separately, and opposite each such description he shall place the actual cash value of the same, according to his best judgment and information, but such valuation shall not be at a rate of less than three dollars per thousand feet, board measure of the pine timber thereon, and thereupon such lists of lands

so appraised shall be transmitted to the Secretary of the Interior for approval, modification, or rejection, as he may deem proper. If the appraisals are rejected as a whole then the Secretary of the Interior shall substitute a new appraisal and the same or original list as approved or modified shall be filed with the Commissioner of the General Land Office as the appraisal of said lands, and as constituting the minimum price for which said lands may be sold, as hereinafter provided, but in no event shall said pine lands be appraised at a rate of less than three dollars per thousand feet board measure of the pine timber thereon. Duplicate lists of said lands as appraised, together with copies of the field-notes surveys, and minutes of examinations shall be filed and kept in the office of the register of the land office of the district within which said lands may be situated, and copies of said lists with the appraisals shall be furnished to any person desiring the same upon application to the Commissioner of the General Land Office or to the register of said local land office.

The compensation of the examiners so provided for in this section shall be fixed by the Secretary of the Interior, but in no event shall exceed the sum of six dollars per day for each person so employed, including all expenses.

All other lands acquired from the said Indians on said reservations other than pine lands are for the purposes of this act termed "agricultural lands."

SEC. 5. That after the survey, examination, and appraisals of said pine lands has been fully completed they shall be proclaimed as in market and offered for sale in the following manner: The Commissioner of the General Land Office shall cause notices to be inserted once in each week for four successive weeks in one newspaper of general circulation published in Minneapolis, Saint Paul, Duluth, and Crookston, Minnesota; Chicago, Illinois; Milwaukee, Wisconsin; Detroit, Michigan; Philadelphia and Williamsport, Pennsylvania; and Boston, Massachusetts, of the sale of said lands at public

auction to the highest bidder for cash at the local land office of the district within which said lands are located, said notice to state the time and place and terms of such sale. At such sale said lands shall be offered in forty-acre parcels, except in case of fractions containing either more or less than forty acres, which shall be sold entire. In no event shall any parcel be sold for a less sum than its appraised value. The residue of such lands remaining unsold after such public offering shall thereafter be subject to private sale for cash at the appraised value of the same upon application at the local land office.

SEC. 6. That when any of the agricultural lands on said reservation not allotted under this act nor reserved for the future use of said Indians have been surveyed, the Secretary of the Interior shall give thirty days' notice through at least one newspaper published at Saint Paul and Crookston, in the State of Minnesota, and, at the expiration of thirty days, the said agricultural lands so surveyed, shall be disposed of by the United States to actual settlers only under the provisions of the homestead law: *Provided*, That each settler under and in accordance with the provisions of said homestead laws shall pay to the United States for the land so taken by him the sum of one dollar and twenty five cents for each and every acre, in five equal annual payments, and shall be entitled to a patent therefor only at the expiration of five years from the date of entry, according to said homestead laws, and after the full payment of said one dollar and twenty-five cents per acre therefor, and due proof of occupancy for said period of five years; and any conveyance of said lands so taken as a homestead, or any contract touching the same, prior to the date of final entry, shall be null and void: *Provided*, That nothing in this act shall be held to authorize the sale or other disposal under its provision of any tract upon which there is a subsisting, valid, pre-emption or homestead entry, but any such entry shall be proceeded with under the regulations and decisions in force at the date of its allowance, and if found

regular and valid, patents shall issue thereon: *Provided*, That any person who has not heretofore had the benefit of the homestead or pre-emption law, and who has failed from any cause to perfect the title to a tract of land heretofore entered by him under either of said laws may make a second homestead entry under the provisions of this act.

SEC. 7. That all money accruing from the disposal of said lands in conformity with the provisions of this act shall, after deducting all the expenses of making the census, of obtaining the cession and relinquishment, of making the removal and allotments, and of completing the surveys and appraisals, in this act provided, be placed in the Treasury of the United States to the credit of all the Chippewa Indians in the State of Minnesota as a permanent fund, which shall draw interest at the rate of five per centum per annum, payable annually for the period of fifty years, after the allotments provided for in this act have been made, and which interest and permanent fund shall be expended for the benefit of said Indians in manner following: One-half of said interest shall, during the said period of fifty years, except in the cases hereinafter otherwise provided, be annually paid in cash in equal shares to the heads of families and guardians of orphan minors for their use; and one-fourth of said interest shall, during the same period and with the like exception, be annually paid in cash in equal shares per capita to all other classes of said Indians; and the remaining one-fourth of said interest shall, during the said period of fifty years, under the direction of the Secretary of the Interior, be devoted exclusively to the establishment and maintenance of a system of free schools among said Indians, in their midst and for their benefit; and at the expiration of the said fifty years, the said permanent fund shall be divided and paid to all of said Chippewa Indians and their issue then living, in cash, in equal shares: *Provided*, That Congress may, in its discretion, from time to time, during the said period of fifty years, appropriate, for the purpose of

promoting civilization and self-support among the said Indians, a portion of said principal sum, not exceeding five per centum thereof. The United States shall, for the benefit of said Indians, advance to them as such interest as aforesaid the sum of ninety thousand dollars annually, counting from the time when the removal and allotments provided for in this act shall have been made, until such time as said permanent fund, exclusive of the deductions hereinbefore provided for, shall equal or exceed the sum of three million dollars, less any actual interest that may in the meantime accrue from accumulations of said permanent fund; the payments of such interest to be made yearly in advance, and, in the discretion of the Secretary of the Interior, may, as to three-fourths thereof, during the first five years be expended in procuring live-stock, teams, farming implements, and seed or such of the Indians to the extent of their shares as are fit and desire to engage in farming, but as to the rest, in cash; and whenever said permanent fund shall exceed the sum of three million dollars the United States shall be fully reimbursed out of such excess, for all the advances of interest made as herein contemplated and other expenses hereunder.

SEC. 8. That the sum of one hundred and fifty thousand dollars is hereby appropriated, or so much thereof as may be necessary, out of any money in the Treasury not otherwise appropriated, to pay for procuring the cession and relinquishment, making the census, surveys, appraisals, removal and allotments, and the first annual payment of interest herein contemplated and provided for, which money shall be expended under the direction of the Secretary of the Interior in conformity with the provisions of this act. A detailed statement of which expenses, except the interest aforesaid, shall be reported to Congress when the expenditures shall be completed.

Approved, January 14, 1889.

The General Allotment Act of 1887
24 Stat. 388

Feb. 8, 1887.

CHAP. 119.—An act to provide for the allotment of lands in severalty to Indians on the various reservations and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon in quantities as follows:

To each head of a family, one-quarter of a section;

To each single person over eighteen years of age, one-eighth of a section;

To each orphan child under eighteen years of age, one-eighth of a section; and

To each other single person under eighteen years now living, or who may be born prior to the date of the order of the President directing an allotment of the lands embraced in any reservation, one-sixteenth of a section: *Provided*, That in case there is not sufficient land in any of said reservations to allot lands to each individual of the classes above named in quantities as above provided, the lands embraced in such

reservation or reservations shall be allotted to each individual of each of said classes pro rata, in accordance with the provisions of this act: *And provided further*, That where the treaty or act of Congress setting apart such reservation provides for the allotment of lands in severalty in quantities in excess of those herein provided, the President, in making allotments upon such reservation, shall allot the lands to each individual Indian belonging thereon in quantity as specified in such treaty or act: *And provided further*, That when the lands allotted are only valuable for grazing purposes, an additional allotment of such grazing lands, in quantities as above provided, shall be made to each individual.

SEC. 2. That all allotments set apart under the provisions of this act shall be selected by the Indians, heads of families selecting for their minor children, and the agents shall select for each orphan child, and in such manner as to embrace the improvements of the Indians making the selection. Where the improvements of two or more Indians have been made on the same legal subdivision of land, unless they shall otherwise agree, a provisional line may be run dividing said lands between them, and the amount to which each is entitled shall be equalized in the assignment of the remainder of the land to which they are entitled under this act: *Provided*, That if any one entitled to an allotment shall fail to make a selection within four years after the President shall direct that allotments may be made on a particular reservation, the Secretary of the Interior may direct the agent of such tribe or band, if such there be, and if there be no agent, then a special agent appointed for that purpose, to make a selection for such Indian, which election shall be allotted as in cases where selections are made by the Indians, and patents shall issue in like manner.

SEC. 3. That the allotments provided for in this act shall be made by special agents appointed by the President for such purpose, and the agents in charge of the respective

reservations on which the allotments are directed to be made, under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and shall be certified by such agents to the Commissioner of Indian Affairs, in duplicate, one copy to be retained in the Indian Office and the other to be transmitted to the Secretary of the Interior for his action, and to be deposited in the General Land Office.

SEC. 4. That where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress, or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land-office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this act for Indians residing upon reservations; and when such settlement is made upon unsurveyed lands, the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto; and patents shall be issued to them for such lands in the manner and with the restrictions as herein provided. And the fees to which the officers of such local land-office would have been entitled had such lands been entered under the general laws for the disposition of the public lands shall be paid to them, from any moneys in the Treasury of the United States not otherwise appropriated, upon a statement of an account in their behalf for such fees by the Commissioner of the General Land Office, and a certification of such account to the Secretary of the Treasury by the Secretary of the Interior.

SEC. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the

Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided*, That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided; and the laws of the State of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all lands in the Indian Territory which may be allotted in severalty under the provisions of this act: *And provided further*, That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress: *Provided however*, That all lands adapted to agriculture, with or without irrigation so sold or released to the United States by any Indian tribe shall be held by the

United States for the sole purpose of securing homes to actual settlers and shall be disposed of by the United States to actual and bona fide settlers only in tracts not exceeding one hundred and sixty acres to any one person, on such terms as Congress shall prescribe, subject to grants which Congress may make in aid of education: *And provided further*, That no patents shall issue therefor except to the person so taking the same as and for a homestead, or his heirs, and after the expiration of five years occupancy thereof as such homestead; and any conveyance of said lands so taken as a homestead, or any contract touching the same, or lien thereon, created prior to the date of such patent, shall be null and void. And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians; to whom such reservations belonged; and the same, with interest thereon at three per cent per annum, shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof. The patents aforesaid shall be recorded in the General Land Office, and afterward delivered, free of charge, to the allottee entitled thereto. And if any religious society or other organization is now occupying any of the public lands to which this act is applicable, for religious or educational work among the Indians, the Secretary of the Interior is hereby authorized to confirm such occupation to such society or organization, in quantity not exceeding one hundred and sixty acres in any one tract, so long as the same shall be so occupied, on such terms as he shall deem just; but nothing herein contained shall change or alter any claim of such society for religious or educational purposes heretofore granted by law. And hereafter in the employment of Indian police, or any other employes in the public service among any of the Indian tribes or bands affected by this act, and where Indians can perform the duties required, those Indians who

have availed themselves of the provisions of this act and become citizens of the United States shall be preferred.

SEC. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

SEC. 7. That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.

SEC. 8. That the provision of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miamies and Peorias, and

Sacs and Foxes, in the Indian Territory, nor to any of the reservations of the Seneca Nation of New York Indians in the State of New York, nor to that strip of territory in the State of Nebraska adjoining the Sioux Nation on the south added by executive order.

SEC. 9. That for the purpose of making the surveys and resurveys mentioned in section two of this act, there be, and hereby is, appropriated, out of any moneys in the Treasury not otherwise appropriated, the sum of one hundred thousand dollars, to be repaid proportionately out of the proceeds of the sales of such land as may be acquired from the Indians under the provisions of this act.

SEC. 10. That nothing in this act contained shall be so construed as to affect the right and power of Congress to grant the right of way through any lands granted to an Indian, or a tribe of Indians, for railroads or other highways, or telegraph lines, for the public use, or to condemn such lands to public uses, upon making just compensation.

SEC. 11. That nothing in this act shall be so construed as to prevent the removal of the Southern Ute Indians from their present reservation in Southwestern Colorado to a new reservation by and with the consent of a majority of the adult male members of said tribe.

Approved, February 8, 1887.

The Burke Act of 1906
34 Stat. 182

May 8, 1906.

CHAP. 2348.—An Act To amend section six of an Act approved February eighth, eighteen hundred and eighty-seven, entitled "An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section six of an Act approved February eighth, eighteen hundred and eighty-seven, entitled "An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," be amended to read as follows:

"SEC. 6. That at the expiration of the trust period and when lands have been conveyed to the Indians by patent in fee, as provided in section five of this Act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made and who has received a patent in fee simple under the provisions of this Act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby

declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property: *Provided*, That, the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: *Provided further*, That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States: *And provided further*, That the provisions of this Act shall not extend to any Indians in the Indian Territory."

That hereafter when an allotment of land is made to any Indian, and any such Indian dies before the expiration of the trust period, said allotment shall be cancelled and the land shall revert to the United States, and the Secretary of the Interior shall ascertain the legal heirs of such Indian, and shall cause to be issued to said heirs and in their names, a patent in fee simple for said land, or he may cause the land to be sold as provided by law and issue a patent therefor to the purchaser or purchasers, and pay the net proceeds to the heirs, or their legal representatives, of such deceased Indian. The action of the Secretary of the Interior in determining the legal heirs of any deceased Indian, as provided herein, shall in all respects be conclusive and final.

Approved, May 8, 1906.

The Homestead Act of 1862
12 Stat. 392

May 20, 1862.

CHAP. LXXV.—*An Act to secure homesteads to actual Settlers on the Public Domain.*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who shall have filed his declaration of intention to become such, as required by the naturalization laws of the United States, and who has never borne arms against the United States Government or given aid and comfort to its enemies, shall, from and after the first January, eighteen hundred and sixty-three, be entitled to enter one quarter section or a less quantity of unappropriated public lands, upon which said person may have filed a preemption claim, or which may, at the time the application is made, be subject to preemption at one dollar and twenty-five cents, or less, per acre; or eighty acres or less of such unappropriated lands, at two dollars and fifty cents per acre, to be located in a body, in conformity to the legal subdivisions of the public lands, and after the same shall have been surveyed: *Provided*, That any person owning and residing on land may, under the provisions of this act, enter other land lying contiguous to his or her said land, which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres.*

SEC. 2. *And be it further enacted, That the person applying for the benefit of this act shall, upon application to the register of the land office in which he or she is about to make such entry, make affidavit before the said register or receiver that*

*he or she is the head of a family, or is twenty-one years or more of age, or shall have performed service in the army or navy of the United States, and that he has never borne arms against the Government of the United States or given aid and comfort to its enemies, and that such application is made for his or her exclusive use and benefit, and that said entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person or persons whomsoever; and upon filing the said affidavit with the register or receiver, and on payment of ten dollars, he or she shall thereupon be permitted to enter the quantity of land specified: *Provided, however*, That no certificate shall be given or patent issued therefor until the expiration of five years from the date of such entry; and if, at the expiration of such time, or at any time within two years thereafter, the person making such entry; or, if he be dead, his widow; or in case of her death, his heirs or devisee; or in case of a widow making such entry, her heirs or devisee, in case of her death; shall prove by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit aforesaid, and shall make affidavit that no part of said land has been alienated, and that he has borne true allegiance to the Government of the United States; then, in such case, he, she, or they, if at that time a citizen of the United States, shall be entitled to a patent, as in other cases provided for by law: *And provided, further*, That in case of the death of both father and mother, leaving an infant child, or children, under twenty-one years of age, the right and fee shall enure to the benefit of said infant child or children; and the executor, administrator, or guardian may, at any time within two years after the death of the surviving parent, and in accordance with the laws of the State in which such children for the time being have their domicil, sell said land for the benefit of said infants, but for no other purpose; and the*

purchaser shall acquire the absolute title by the purchase, and be entitled to a patent from the United States, on payment of the office fees and sum of money herein specified.

SEC. 3. *And be it further enacted*, That the register of the land office shall note all such applications on the tract books and plats of his office, and keep a register of all such entries, and make return thereof to the General Land Office, together with the proof upon which they have been founded.

SEC. 4. *And be it further enacted*, That no lands acquired under the provisions of this act shall in any event become liable to the satisfaction of any debt or debts contracted prior to the issuing of the patent therefor.

SEC. 5. *And be it further enacted*, That if, at any time after the filing of the affidavit, as required in the second section of this act, and before the expiration of the five years aforesaid, it shall be proven, after due notice to the settler, to the satisfaction of the register of the land office, that the person having filed such affidavit shall have actually changed his or her residence, or abandoned the said land for more than six months at any time, then and in that event the land so entered shall revert to the government.

SEC. 6. *And be it further enacted*, That no individual shall be permitted to acquire title to more than one quarter section under the provisions of this act; and that the Commissioner of the General Land Office is hereby required to prepare and issue such rules and regulations, consistent with this act, as shall be necessary and proper to carry its provisions into effect; and that the registers and receivers of the several land offices shall be entitled to receive the same compensation for any lands entered under the provisions of this act that they are now entitled to receive when the same quantity of land is entered with money, one half to be paid by the person making the application at the time of so doing, and the other half on the issue of the certificate by the person to whom it may be issued; but this shall not be construed to enlarge the

maximum of compensation now prescribed by law for any register or receiver: *Provided*, That nothing contained in this act shall be so construed as to impair or interfere in any manner whatever with existing preemption rights: *And provided, further*, That all persons who may have filed their applications for a preemption right prior to the passage of this act, shall be entitled to all privileges of this act: *Provided, further*, That no person who has served, or may hereafter serve, for a period of not less than fourteen days in the army or navy of the United States, either regular or volunteer, under the laws thereof, during the existence of an actual war, domestic or foreign, shall be deprived of the benefits of this act on account of not having attained the age of twenty-one years.

SEC. 7. *And be it further enacted*, That the fifth section of the act entitled "An act in addition to an act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes," approved the third of March, in the year eighteen hundred and fifty-seven, shall extend to all oaths, affirmations, and affidavits, required or authorized by this act.

SEC. 8. *And be it further enacted*, That nothing in this act shall be so construed as to prevent any person who has availed him or herself of the benefits of the first section of this act, from paying the minimum price, or the price to which the same may have graduated, for the quantity of land so entered at any time before the expiration of the five years, and obtaining a patent therefor from the government, as in other cases provided by law, on making proof of settlement and cultivation as provided by existing laws granting preemption rights.

Approved, May 20, 1862.

VOL. XII. PUB—50

1891 Amendments to Homestead Act of 1862
26 Stat. 1095

March 3, 1891.

CHAP. 561.—An act to repeal timber-culture laws, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That an act entitled "An act to amend an act entitled 'An act to encourage the growth of timber on the Western prairies,' approved June fourteenth, eighteen hundred and seventy eight, and all laws supplementary thereto or amendatory thereof, be, and the same are hereby, repealed: *Provided*, That this repeal shall not affect any valid rights heretofore accrued or accruing under said laws, but all bona fide claims lawfully initiated before the passage of this act may be perfected upon due compliance with law, in the same manner, upon the same terms and conditions, and subject to the same limitations, forfeitures, and contests as if this act had not been passed: *And provided further*, That the following words of the last clause of section two of said act, namely, "That not less than twenty-seven hundred trees were planted on each acre," are hereby repealed: *And provided further*, That in computing the period of cultivation the time shall run from the date of the entry, if the necessary acts of cultivation were performed within the proper time: *And provided further*, That the preparation of the land and the planting of trees shall be construed as acts of cultivation, and the time authorized to be so employed and actually employed shall be computed as a part of the eight years of cultivation required by statute: *Provided*, That any person who has made entry of any public lands of the United States under the timber-culture laws, and who has for a period of four years in good faith complied with

the provisions of said laws and who is an actual bona fide resident of the State or Territory in which said land is located shall be entitled to make final proof thereto, and acquire title to the same, by the payment of one dollar and twenty five cents per acre for such tract, under such rules and regulations as shall be prescribed by the Secretary of the Interior, and registers and receivers shall be allowed the same fees and compensation for final proofs in timber-culture entries as is now allowed by law in homestead entries: *And provided further*, That no land acquired under the provisions of this act shall in any event become liable to the satisfaction of any debt or debts contracted prior to the issuing of the final certificate therefor.

SEC. 2. That an act to provide for the sale of desert lands in certain States and Territories, approved March third, eighteen hundred and seventy-seven, is hereby amended by adding thereto the following sections:

SEC. 4. That at the time of filing the declaration hereinbefore required the party shall also file a map of said land, which shall exhibit a plan showing the mode of contemplated irrigation, and which plan shall be sufficient to thoroughly irrigate and reclaim said land, and prepare it to raise ordinary agricultural crops, and shall also show the source of the water to be used for irrigation and reclamation. Persons entering or proposing to enter separate sections, or fractional parts of sections, of desert lands may associate together in the construction of canals and ditches for irrigating and reclaiming all of said tracts, and may file a joint map or maps showing their plan of internal improvements.

SEC. 5. That no land shall be patented to any person under this act unless he or his assignors shall have expended in the necessary irrigation, reclamation, and cultivation thereof, by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water rights for the irrigation of the same, at least three dollars per

acre of whole tract reclaimed and patented in the manner following: Within one year after making entry for such tract of desert land as aforesaid the party so entering shall expend not less than one dollar per acre for the purposes aforesaid; and he shall in like manner expend the sum of one dollar per acre during the second and also during the third year thereafter, until the full sum of three dollars per acre is so expended. Said party shall file during each year with the register proof, by the affidavits of two or more credible witnesses, that the full sum of one dollar per acre has been expended in such necessary improvements during such year, and the manner in which expended, and at the expiration of the third year a map or plan showing the character and extent of such improvements. If any party who has made such application shall fail during any year to file the testimony aforesaid the lands shall revert to the United States, and the twenty-five cents advanced payment shall be forfeited to the United States, and the entry shall be cancelled. Nothing herein contained shall prevent a claimant from making his final entry and receiving his patent at an earlier date than hereinbefore prescribed, provided that he then makes the required proof of reclamation to the aggregate extent of three dollars per acre: *Provided*, That proof be further required of the cultivation of one-eighth of the land.

SEC. 6. That this act shall not affect any valid rights heretofore accrued under said act of March third, eighteen hundred and seventy-seven, but all bona-fide claims heretofore lawfully initiated may be perfected, upon due compliance with the provisions of said act, in the same manner, upon the same terms and conditions, and subject to the same limitations, forfeitures, and contests as if this act had not been passed; or said claims, at the option of the claimant, may be perfected and patented under the provisions of said act, as amended by this act, so far as applicable; and all acts and parts of acts in conflict with this act are hereby repealed.

SEC. 7. That at any time after filing the declaration, and within the period of four years thereafter, upon making satisfactory proof to the register and the receiver of the reclamation and cultivation of said land to the extent and cost and in the manner aforesaid, and substantially in accordance with the plans herein provided for, and that he or she is a citizen of the United States, and upon payment to the receiver of the additional sum of one dollar per acre for said land, a patent shall issue therefor to the applicant or his assigns; but no person or association of persons shall hold by assignment or otherwise prior to the issue of patent, more than three hundred and twenty acres of such arid or desert lands but this section shall not apply to entries made or initiated prior to the approval of this act. *Provided, however*, That additional proofs may be required at any time within the period prescribed by law, and that the claims or entries made under this or any preceding act shall be subject to contest, as provided by the law, relating to homestead cases, for illegal inception, abandonment, or failure to comply with the requirements of law, and upon satisfactory proof thereof shall be canceled, and the lands, and moneys paid therefor, shall be forfeited to the United States.

SEC. 8. That the provisions of the act to which this is an amendment, and the amendments thereto, shall apply to and be in force in the State of Colorado, as well as the States named in the original act; and no person shall be entitled to make entry of desert land except he be a resident citizen of the State or Territory in which the land sought to be entered is located."

SEC. 3. That section twenty-two hundred and eighty-eight of the Revised Statutes be amended so as to read as follows:

SEC. 2288. Any bona fide settler under the pre-emption, homestead, or other settlement law shall have the right to transfer, by warranty against his own acts, any portion of his claim for church, cemetery, or school purposes, or for the

right of way of railroads, canals, reservoirs, or ditches for irrigation or drainage across it; and the transfer for such public purposes shall in no way vitiate the right to complete and perfect the title to his claim."

SEC. 4. That chapter four of title thirty-two, excepting sections twenty-two hundred and seventy-five, twenty-two hundred and seventy-six, twenty-two hundred and eighty-six, of the Revised Statutes of the United States, and all other laws allowing pre-emption of the public lands of the United States, are hereby repealed, but all bona fide claims lawfully initiated before the passage of this act, under any of said provisions of law so repealed, may be perfected upon due compliance with law, in the same manner, upon the same terms and conditions, and subject to the same limitations, forfeitures, and contests, as if this act had not been passed.

SEC. 5. That sections twenty two hundred and eighty-nine and twenty-two hundred and ninety, in said chapter numbered five of the Revised Statutes, be, and the same are hereby, amended, so that they shall read as follows:

SEC. 2289. Every person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration of intention to become such, as required by the naturalization laws, shall be entitled to enter one-quarter section, or a less quantity, of unappropriated public lands, to be located in a body in conformity to the legal subdivisions of the public lands; but no person who is the proprietor of more than one hundred and sixty acres of land in any State or Territory, shall acquire any right under the homestead law. And every person owning and residing on land may, under the provisions of this section, enter other land lying contiguous to his land, which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres.

SEC. 2290. That any Person applying to enter land under the preceding section shall first make and subscribe before the

proper officer and file in the proper land office an affidavit that he or she is the head of a family, or is over twenty-one years of age, and that such application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons or corporation, and that he or she will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence, and cultivation necessary to acquire title to the land applied for; that he or she is not acting as agent of any person, corporation, or syndicate in making such entry, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land entered, or any part thereof, or the timber thereon; that he or she does not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for himself, or herself, and that he or she has not directly or indirectly made, and will not make, any agreement or contract in any way or manner, with any person or persons, corporation or syndicate whatsoever, by which the title which he or she might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself, or herself, and upon filing such affidavit with the register or receiver on payment of five dollars when the entry is of not more than eighty acres, and on payment of ten dollars when the entry is for more than eighty acres, he or she shall thereupon be permitted to enter the amount of land specified."

SEC. 6. That section twenty-three hundred and one of the Revised Statutes be amended so as to read as follows:

"SEC. 2301. Nothing in this chapter shall be so construed as to prevent any person who shall hereafter avail himself of the benefits of section twenty-two hundred and eighty nine from paying the minimum price for the quantity of land so entered at any time after the expiration of fourteen calendar months from the date of such entry, and obtaining a patent therefor, upon making proof of settlement and of residence

and cultivation for such period of fourteen months," and the provision of this section shall apply to lands on the ceded portion of the Sioux Reservation by act approved March second, eighteen hundred and eighty-nine, in South Dakota, but shall not relieve said settlers from any payments now required by law.

SEC. 7. That whenever it shall appear to the Commissioner of the General Land Office that a clerical error has been committed in the entry of any of the public lands such entry may be suspended, upon proper notification to the claimant, through the local land office, until the error has been corrected; and all entries made under the preemption, homestead, desert-land, or timber-culture laws, in which final proof and payment may have been made and certificates issued, and to which there are no adverse claims originating prior to final entry and which have been sold or incumbered prior to the first day of March, eighteen hundred and eighty-eight, and after final entry, to bona-fide purchasers, or incumbrancers, for a valuable consideration, shall unless upon an investigation by a Government Agent, fraud on the part of the purchaser has been found, be confirmed and patented upon presentation of satisfactory proof to the Land Department of such sale or encumbrance: *Provided*, That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert-land or preemption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him; but this proviso shall not be construed to require the delay of two years from the date of said entry before the issuing of a patent therefor.

SEC. 8. That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five

years from the passage of this act, and suits to vacate and annual patents hereafter issued shall only be brought within six years after the date of the issuance of such patents. And in the States of Colorado, Montana, Idaho, North Dakota and South Dakota, Wyoming, and in the District of Alaska and the gold and silver regions of Nevada, and the Territory of Utah, in any criminal prosecution or civil action by the United States for a trespass on such public timber lands or to recover timber or lumber cut thereon, it shall be a defense if the defendant shall show that the said timber was so cut or removed from the timber lands for use in such State or Territory by a resident thereof for agricultural, mining, manufacturing, or domestic purposes, and has not been transported out of the same; but nothing herein contained shall apply to operate to enlarge the rights of any railway company to cut timber on the public domain: *Provided*, That the Secretary of the Interior may make suitable rules and regulations to carry out the provisions of this section.

SEC. 9. That hereafter no public lands of the United States, except abandoned military or other reservations, isolated and disconnected fractional tracts authorized to be sold by section twenty-four hundred and fifty-five of the Revised Statutes, and mineral and other lands the sale of which at public auction has been authorized by acts of Congress of a special nature having local application, shall be sold at public sale.

SEC. 10. That nothing in this act shall change, repeal, or modify any agreements or treaties made with any Indian tribes for the disposal of their lands, or of land ceded to the United States to be disposed of for the benefit of such tribes, and the proceeds thereof to be placed in the Treasury of the United States; and the disposition of such lands shall continue in accordance with the provisions of such treaties or agreements, except as provided in section 5 of this act.

SEC. 11. That until otherwise ordered by Congress lands in Alaska may be entered for town-site purposes, for the several

use and benefit of the occupants of such town sites, by such trustee or trustees as may be named by the Secretary of the Interior for that purpose, such entries to be made under the provisions of section twenty-three hundred and eighty-seven of the Revised Statutes as near as may be; and when such entries shall have been made the Secretary of the Interior shall provide by regulation for the proper execution of the trust in favor of the inhabitants of the town site, including the survey of the land into lots, according to the spirit and intent of said section twenty-three hundred and eighty-seven of the Revised Statutes, whereby the same results would be reached as though the entry had been made by a county judge and the disposal of the lots in such town site and the proceeds of the sale thereof had been prescribed by the legislative authority of a State or Territory: *Provided*, That no more than six hundred and forty acres shall be embraced in one townsite entry.

SEC. 12. That any citizen of the United States twenty-one years of age, and any association of such citizens, and any corporation incorporated under the laws of the United States, or any State or Territory of the United States now authorized by law to hold lands in the Territories now or hereafter in possession of and occupying public lands in Alaska for the purpose of trade or manufactures, may purchase not exceeding one hundred and sixty acres to be taken as near as practicable in a square form, of such land at two dollars and fifty cents per acre: *Provided*, That in case more than one person, association or corporation shall claim the same tract of land the person, association or corporation having the prior claim by reason of possession and continued occupation shall be entitled to purchase the same; but the entry of no person, association, or corporation shall include improvements made by or in possession of another prior to the passage of this act.

SEC. 13. That it shall be the duty of any person, association, or corporation entitled to purchase land under this act to make an application to the United States marshal, ex

officio surveyor-general of Alaska, for an estimate of the cost of making a survey of the lands occupied by such person, association, or corporation, and the cost of the clerical work necessary to be done in the office of the said United States marshal, ex officio surveyor-general; and on the receipt of such estimate from the United States marshal, ex officio surveyor general, the the said person, association, or corporation shall deposit the amount in a United States depository, as is required by section numbered twenty-four hundred and one, Revised Statutes, relating to deposits for surveys.

That on the receipt by the United States marshal, ex-officio surveyor-general, of the said certificates of deposit, he shall employ a competent person to make such survey, under such rules and regulations as may be adopted by the Secretary of the Interior, who shall make his return of his field notes and maps to the office of the said United States marshal, ex-officio surveyor-general; and the said United States marshal, ex officio surveyor-general, shall cause the said field notes and plats of such survey to be examined, and, if correct, approve the same, and shall transmit certified copies of such maps and plats to the office of the Commissioner of the General Land Office.

That when the said field notes and plats of said survey shall have been approved by the said Commissioner of the General Land Office, he shall notify such person, association, or corporation, who shall then, within six months after such notice, pay to the said United States marshal, ex officio surveyor-general, for such land, and patent shall issue for the same.

SEC. 14. That none of the provisions of the last two preceding sections of this act shall be so construed as to warrant the sale of any lands belonging to the United States which shall contain coal or the precious metals, or any town site, or which shall be occupied by the United States for

public purposes, or which shall be reserved for such purposes, or to which the natives of Alaska have prior rights by virtue of actual occupation, or which shall be selected by the United States Commissioner of Fish and Fisheries on the island of Kadiak and Afognak for the purpose of establishing fish-culture stations. And all tracts of land not exceeding six hundred and forty acres in any one tract now occupied as missionary stations in said district of Alaska are hereby excepted from the operation of the last three preceding sections of this act. No portion of the islands of the Pribylov Group or the Seal Islands of Alaska shall be subject to sale under this act; and the United States reserves, and there shall be reserved in all patents issued under the provisions of the last two preceding sections the right of the United States to regulate the taking of salmon and to do all things necessary to protect and prevent destruction of salmon in all the waters of the lands granted frequented by salmon.

SEC. 15. That until otherwise provided by law the body of lands known as Annette Islands, situated in Alexander Archipelago in Southeastern Alaska, on the north side of Dixon's entrance, be, and the same is hereby, set apart as a reservation for the use of the Metlakahtla Indians, and those people known as Metlakahtlans who have recently emigrated from British Columbia to Alaska, and such other Alaskan natives as may join them, to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may prescribed from time to time by the Secretary of the Interior.

SEC. 16. That town-site entries may be made by incorporated towns and cities on the mineral lands of the United States, but no title shall be acquired by such towns or cities to any vein of gold, silver, cinnabar, copper, or lead, or to any valid mining claim or possession held under existing law. When mineral veins are possessed within the limits of an incorporated town or city, and such possession is

recognized by local authority or by the laws of the United States, the title to town lots shall be subject to such recognized possession and the necessary use thereof and when entry has been made or patent issued for such town sites to such incorporated town or city, the possessor of such mineral vein may enter and receive patent for such mineral vein, and the surface ground appertaining thereto: *Provided*, That no entry shall be made by such mineral-vein claimant for surface ground where the owner or occupier of the surface ground shall have had possession of the same before the inception of the title of the mineral-vein applicant.

SEC. 17. That reservoir sites located or selected and to be located and selected under the provisions of "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June Thirtieth, eighteen hundred and eighty-nine, and for other purposes," and amendments thereto, shall be restricted to and shall contain only so much land as is actually necessary for the construction and maintenance of reservoirs excluding so far as practicable lands occupied by actual settlers at the date of the location of said reservoirs and that the provision of "An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-one, and for other purposes," which reads as follows, viz: "No person who shall after the passage of this act enter upon any of the public lands with a view to occupation, entry, or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate under all said laws," shall be construed to include in the maximum amount of lands the title to which is permitted to be acquired by one person only agricultural lands and not to include lands entered or sought to be entered under mineral land laws.

SEC. 18. That the right of way through the public lands and reservations of the United States is hereby granted to any

canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any State or Territory, which shall have filed, or may hereafter file, with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof; also the right to take, from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch: *Provided*, That no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and all maps, of location shall be subject to the approval of the Department of the Government having jurisdiction of such reservation, and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories.

SEC. 19. That any canal or ditch company desiring to secure the benefits of this act shall, within twelve months after the location of ten miles of its canal, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a map of its canal or ditch and reservoir; and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such rights of way shall pass shall be disposed of subject to such right of way. Whenever any person or corporation, in the construction of any canal, ditch, or reservoir, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

SEC. 20. That the provisions of this act shall apply to all canals ditches, or reservoirs, heretofore or hereafter constructed, whether constructed by corporations, individuals, or association of individuals, on the filing of the certificates and maps herein provided for. If such ditch, canal, or reservoir, has been or shall be constructed by an individual or association of individuals, it shall be sufficient for such individual or association of individuals to file with the Secretary of the Interior, and with the register of the land office where said land is located, a map of the line of such canal, ditch, or reservoir, as in case of a corporation, with the name of the individual owner or owners thereof, together with the articles of association, if any there be. Plats heretofore filed shall have the benefits of this act from the date of their filing, as though filed under it: *Provided*, That if any section of said canal, or ditch, shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any uncompleted section of said canal, ditch, or reservoir, to the extent that the same is not completed at the date of the forfeiture.

SEC. 21. That nothing in this act shall authorize such canal or ditch company to occupy such right of way except for the purpose of said canal or ditch, and then only so far as may be necessary for the construction, maintenance, and care of said canal or ditch.

SEC. 22. That the section of land reserved for the benefit of the Dakota Central Railroad Company on the west bank of the Missouri River, at the mouth of Bad River, as provided by section sixteen of "An act to divide a portion of the reservation of the Sioux Nation of Indians in Dakota into separate reservations and to secure the relinquishment of the Indian title to the remainder and for other purposes," approved March second, eighteen hundred and eighty-nine, shall be subject to entry under the town-site law only.

SEC. 23. That in all cases where second entries of land on the Osage Indian trust and diminished reserve lands in Kansas, to which at the time there were no adverse claims, have been made and the law complied with as to residence and improvement, said entries be, and the same are hereby, confirmed, and in all cases where persons were actual settlers and residing upon their claims upon said Osage Indian trust and diminished reserve lands in the State of Kansas on the ninth day of May, eighteen hundred and seventy two, and who have made subsequent pre-emption entries either upon public or upon said Osage Indian trust and diminished reserve lands, upon which there were no legal prior adverse claims at the time, and the law complied with as to settlement, said subsequent entries be, and the same are hereby, confirmed.

SEC. 24 That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof.

Approved, March 3, 1891.

SEP 4 1997

CLERK

In The
Supreme Court of the United States

October Term, 1996

CASS COUNTY, MINNESOTA; SHARON K.
ANDERSON, in her official capacity as Cass County
Auditor; MARGE L. DANIELS, in her official capacity
as Cass County Treasurer; STEVE KUHA, in his official
capacity as Cass County Assessor; JAMES DEMGEN,
in his official capacity as Cass County Commissioner;
JOHN STRANNE, in his official capacity as Cass County
Commissioner; GLEN WITHAM, in his official capacity
as Cass County Commissioner; ERWIN OSTLUND, in
his official capacity as Cass County Commissioner;
VIRGIL FOSTER, in his official capacity as
Cass County Commissioner,

Petitioners,

v.

LEECH LAKE BAND OF CHIPPEWA INDIANS,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITIONERS' REPLY BRIEF

Office of Cass County
Attorney

EARL E. MAUS
Cass County Attorney
Counsel of Record
Cass County Courthouse
P.O. Box 3000
Walker, Minnesota 56484
Telephone: (218) 547-7255
Counsel for Petitioners

Of Counsel:

JAMES W. NEHER
Assistant Attorney General
State of Minnesota

TABLE OF CONTENTS

	Page
ARGUMENT	1
THE BAND'S STATEMENT IN ITS BRIEF IN OPPOSITION THAT THE LAND PARCELS AT ISSUE IN THE <i>LUMMI</i> CASE WERE ORIGINALLY ALLOTTED TO INDIVIDUAL INDIANS UNDER THE GENERAL ALLOTMENT ACT IS INCOR- RECT	1
CONCLUSION	2

TABLE OF AUTHORITIES

Page

DECISIONS

<i>Lummi Indian Tribe v. Whatcom County, Washington</i> , 5 F.3d 1355 (9th Cir. 1993), cert. denied, 144 S. Ct. 2727 (1994)	1
---	---

PETITIONERS' REPLY BRIEF

Petitioners¹ ("Cass County" or "the County") respectfully submit this Reply Brief in response to the Brief in Opposition filed by Respondent Leech Lake Band of Chippewa Indians ("the Band").

 ARGUMENT

THE BAND'S STATEMENT IN ITS BRIEF IN OPPOSITION THAT THE LAND PARCELS AT ISSUE IN THE LUMMI CASE WERE ORIGINALLY ALLOTTED TO INDIVIDUAL INDIANS UNDER THE GENERAL ALLOTMENT ACT IS INCORRECT.

The sole purpose of this Reply Brief is to correct a misstatement of fact appearing in the Band's Brief in Opposition to Cass County's Petition for Writ of Certiorari. In so doing, the County does not intend to reargue any matters which are in dispute between the parties.

In contending that there really is not a split among the Sixth, Eighth, and Ninth Circuits on the issue of whether tribal land is subject to state and local taxation by reason of its free alienability, the Band states with respect to the decision in *Lummi Indian Tribe v. Whatcom County, Washington*, 5 F.3d 1355 (9th Cir. 1993), cert. denied, 114 S. Ct. 2727 (1994), that:

In one important respect, the *Lummi* holding [in favor of taxability] is not even at odds with the holding of the Court of Appeals in the

¹ The Petitioners include Cass County, Minnesota, and eight county officials.

instant case. In *Lummi*, all of the disputed parcels originally were allotted to individual Indians pursuant to the General Allotment Act of 1887, and became fee property in much the same way as the land at issue in *Yakima*.

Brief in Opposition at 5. This statement is incorrect.

Rather than being allotted pursuant to the General Allotment Act, the land at issue in *Lummi* was originally allotted to individual Indians in 1884 (three years before the General Allotment Act) under the Treaty of Point Elliott. *Lummi*, 5 F.3d at 1356-57. Furthermore, one of the asserted grounds for the Lummi Tribe's claim that its land was not subject to taxation was the very fact that it had been allotted "under the Treaty of Point Elliott rather than the General Allotment Act, which permits such taxation." *Id.* at 1356.

Thus, contrary to the Band's assertion, there is a conflict among the circuits with respect to the issue in this case. The Ninth Circuit has held that tribally owned land, if freely alienable, is subject to state and local taxation no matter how it became patented; while the Sixth and Eighth Circuits have held that such land becomes taxable only by reason of the Burke Act amendment to section 6 of the General Allotment Act.

CONCLUSION

The *Lummi* decision, holding that tribally owned land originally allotted to individual Indians under a treaty is subject to ad valorem taxation, clearly is in direct conflict with the decision in this case holding that the Burke Act

amendment to section 6 of the General Allotment Act is a prerequisite to the taxability of such land.

Dated: September 4, 1997

Respectfully submitted,
Office of Cass County
Attorney

EARL E. MAUS
Cass County Attorney
Counsel of Record
Cass County Courthouse
P.O. Box 3000
Walker, Minnesota 56484
Telephone: (218) 547-7255
Counsel for Petitioners

Of Counsel:

JAMES W. NEHER
Assistant Attorney General
State of Minnesota

3

In The
Supreme Court of the United States
October Term, 1996

CASS COUNTY, MINNESOTA; SHARON K.
ANDERSON, in her official capacity as
Cass County Auditor; MARGE L. DANIELS, in her
official capacity as Cass County Treasurer; STEVE
KUHA, in his official capacity as Cass County
Assessor; JAMES DEMGEN, in his official capacity as
Cass County Commissioner; JOHN STRANNE, in his
official capacity as Cass County Commissioner;
GLEN WITHAM, in his official capacity as Cass
County Commissioner; ERWIN OSTLUND, in his
official capacity as Cass County Commissioner;
VIRGIL FOSTER, in his official capacity as
Cass County Commissioner,

v. *Petitioners,*

LEECH LAKE BAND OF CHIPPEWA INDIANS,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF OF AMICUS CURIAE STATES OF
SOUTH DAKOTA, CALIFORNIA, COLORADO,
IDAHO, MICHIGAN, MONTANA, NEVADA AND
UTAH IN SUPPORT OF PETITIONERS

MARK W. BARNETT
Attorney General
State of South Dakota

JOHN PATRICK GUHIN*
Deputy Attorney General
500 East Capitol Avenue
Pierre, South Dakota 57501-5070
Telephone: (605) 773-3215

**Counsel of Record*

[Additional counsel listed on inside cover]

13pp

DANIEL E. LUNGREN
Attorney General
State of California

GALE A. NORTON
Attorney General
State of Colorado

ALAN G. LANCE
Attorney General
State of Idaho

FRANK J. KELLEY
Attorney General
State of Michigan

JOSEPH P. MAZUREK
Attorney General
State of Montana

FRANKIE SUE DEL PAPA
Attorney General
State of Nevada

JAN GRAHAM
Attorney General
State of Utah

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
INTEREST OF AMICI STATES	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THE COURT OF APPEALS' DECISION DEMANDS A PARCEL-BY-PARCEL EXAM- INATION OF TITLE TO DETERMINE TAX- ABILITY OF LANDS OWNED BY A TRIBE OR ITS MEMBERS AND OTHERWISE LEADS TO ANOMALOUS RESULTS	4
II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT AMONG THE COURTS OF APPEAL FOR THE EIGHTH, SIXTH, AND NINTH CIRCUITS	6
III. THIS COURT'S DECISION IN COUNTY OF YAKIMA CLEARLY HELD THAT ALIEN- ABILITY EQUALS TAXABILITY	7
CONCLUSION	9

TABLE OF AUTHORITIES

Page

CASES CITED:

<i>County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation</i> , 502 U.S. 251 (1992)	1, 3, 4, 5, 7, 8
<i>Goudy v. Meath</i> , 203 U.S. 146 (1906)	3, 4, 7, 8
<i>Leech Lake Band of Chippewa Indians v. Cass County, Minnesota</i> , 108 F.3d 820 (8th Cir. 1997)	4, 6, 8
<i>Lummi Indian Tribe v. Whatcom County</i> , 5 F.3d 1355 (9th Cir. 1993), cert. denied, ___ U.S. ___ 114 S.Ct. 2727 (1994)	2, 6
<i>United States ex rel. Saginaw Chippewa Indian Tribe v. Michigan</i> , 106 F.3d 130 (6th Cir. 1997), petition for cert. filed, 66 U.S.L.W. 3085 (U.S. June 30, 1997) (No. 97-14)	2, 6

OTHER AUTHORITIES:

24 Stat. 388 (1887)	2
25 Stat. 642 (1889)	4
34 Stat. 132 (1906)	2
Justice Stevens, <i>Some Thoughts on Judicial Restraint</i> , 66 <i>Judicature</i> 177 (1982) quoted in Robert L. Stern, et al., <i>Supreme Court Practice</i> 171 (7th ed. 1993)	7

INTRODUCTION

The states of South Dakota, California, Colorado, Idaho, Michigan, Montana, Nevada and Utah, through their respective Attorneys General, respectfully submit a brief amicus curiae in support of Petitioners pursuant to Supreme Court Rule 37.

INTEREST OF AMICI STATES

The United States, through treaty, statute, or executive order, has created reservations within each of the Amici States. Each of the States, either directly or through its political subdivisions, imposes an ad valorem tax on property which typically supports the schools of the area. Such schools are, of course, open without restriction to tribal members.

Following this Court's decision in *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251 (1992), the States or their political subdivisions have had reaffirmed their power to finance schools or other activities through taxation of land owned in fee by tribes and tribal members. The decision of the court of appeals, however, puts into question the legitimacy of such taxation. Thus, despite the argument of the Respondent Leech Lake Band of Chippewa Indians that "this case involves a Minnesota-specific federal law, and . . . the analysis of the impact of that law depends on circumstances unique to Minnesota" (Respondent's Brief in Opposition at 4), it is virtually certain that States in the Eighth Circuit will be confronted with the argument that ad valorem taxation of any fee land in a reservation

owned by a tribal member or tribe but (1) allotted under the General Allotment Act prior to adoption of the Burke Act, 34 Stat. 132 (1906), (2) allotted under another act or treaty, or (3) originally conveyed by the United States in fee to a non-Indian is forbidden. If left standing, the Eighth Circuit's decision will mean that such States and their counties, or perhaps the tribal taxpayers themselves, will be required to engage in a parcel-by-parcel determination of whether imposition of property taxes is appropriate. Not only will such an examination be time-consuming and expensive, but it also will result in arbitrary distinctions, as is the situation here, between lands that are taxable and those that are not.

Aside from its immediate consequences with respect to the Petitioners and other States within the Eighth Circuit, the court of appeals' decision conflicts directly with the Ninth Circuit's decision in *Lummi Indian Tribe v. Whatcom County*, 5 F.3d 1355 (9th Cir. 1993), cert. denied, ___ U.S. ___, 114 S.Ct. 2727 (1994). The States have a strong interest in uniform application of doctrinal principles so directly affecting the public fisc and such a sensitive area as the taxation of Indian tribes and their members. The conflict between the circuits, moreover, is not limited to this matter. The Sixth Circuit in *United States ex rel. Saginaw Chippewa Indian Tribe v. Michigan*, 106 F.3d 130 (6th Cir. 1997), petition for cert. filed, 66 U.S.L.W. 3085 (U.S. June 30, 1997) (No. 97-14) ("*Saginaw*"), similarly has disagreed with *Lummi's* reasoning and found land allotted under a treaty predating the General Allotment Act, 24 Stat. 388 (1887), immune from state ad valorem taxation to the extent owned in fee by tribal members. Postponing resolution of the issue presented here or, for that matter, the question raised in *Saginaw*

simply will invite further litigation in the remaining circuits, with this Court eventually required to address the issue. It is in the States' interest to have the controversy determined now to avoid lawsuits that carry high costs both in monetary terms and in a pernicious effect on the often fragile government-to-government relationship between States, their local subdivisions, and tribes.

Finally, the Amici States have a strong interest in assuring that, when this Court sets out a bright line rule of law, it is adhered to in the lower federal courts. This Court in *County of Yakima* did set out such a bright line rule – alienability equals taxability with respect to lands which left the public domain pursuant to Allotment Era legislation – and they believe the Eighth Circuit's decision has failed to adhere to that rule.

SUMMARY OF ARGUMENT

In *Goudy v. Meath*, 203 U.S. 146 (1906), this Court made clear its determination that when trust lands became alienable, Congress intended, unless it specifically indicated otherwise, that they also be made taxable. This Court adhered to that precedent in *County of Yakima* as did the Court of Appeals for the Ninth Circuit in the *Lummi* opinion.

The Eighth Circuit Court of Appeals, in the case at bar, and the Sixth Circuit Court of Appeals, in a case in which certiorari is also sought, have spurned that precedent and attempted to develop a rule which apparently makes taxability contingent upon whether the lands were patented pursuant to the 1906 amendments to the General Allotment Act. The proposed rule will assuredly

appear irrational both to Indians and non-Indians affected by it and would, moreover, force state and local officials to determine the history of each parcel to determine its taxability.

This Court should grant certiorari to resolve the conflict in the circuits and to assure compliance with the bright line precedents of *Goudy* and *County of Yakima*.

ARGUMENT

I

THE COURT OF APPEALS' DECISION DEMANDS A PARCEL-BY-PARCEL EXAMINATION OF TITLE TO DETERMINE TAXABILITY OF LANDS OWNED BY A TRIBE OR ITS MEMBERS AND OTHERWISE LEADS TO ANOMALOUS RESULTS.

Under the Nelson Act of 1889, 25 Stat. 642, Congress provided for the disposition of land within, inter alia, the Respondent's reservation in several different ways: allotment to individual tribal members; general homesteading to the public at large; and sale under the "pine lands provisions" in sections 3 and 4 of the Act. *Leech Lake Band of Chippewa Indians v. Cass County, Minnesota*, 108 F.3d 820, 823 (8th Cir. 1997). In concluding that land allotted after adoption of the Burke Act in 1906 was taxable, the Eighth Circuit relied on the explicit incorporation of the General Allotment Act into that section of the Nelson Act dealing with the allotment of lands to tribal members but found nontaxable lands that left the public domain through the other provisions of the 1889 statute, together with lands allotted prior to the Burke Act, to the extent now held in fee by tribal members. Consequently, of the twenty-one

parcels at issue here, eight were held nontaxable because they had not been allotted, and the tax status of the remaining thirteen parcels was left for determination on remand on the basis of whether they were allotted before or after passage of the Burke Act.

It is difficult to conceive of a more cumbersome application of the principles articulated in *County of Yakima*. The court of appeals' decision means, as a practical matter, that state and county officials, or possibly individual taxpayers, will be required to determine how each parcel of land within a reservation left the public domain – a singularly daunting task in States where reservations are large and the affected parcels number in the thousands, not less than two dozen. No less troublesome is the fact that, under the Eighth Circuit's reasoning, a parcel that left the public domain by virtue of a homestead claim by a nonmember will not be taxable if acquired subsequently by a member, while a neighboring parcel that left the public domain through allotment and then fee patent will be taxable. These results, in short, are accompanied by a very substantial burden on state and local government tax administrators whether measured by litigation or other out-of-pocket costs or by public reaction to seemingly illogical taxation rules. This Court should not wait until another day to decide whether this burden should be borne.

II

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT AMONG THE COURTS OF APPEAL FOR THE EIGHTH, SIXTH, AND NINTH CIRCUITS.

In *Lummi*, the Ninth Circuit determined that reservation land patented under a treaty, rather than under the General Allotment Act, was subject to ad valorem taxation. Four years later, the Sixth Circuit in *Saginaw* and the Eighth Circuit below found precisely to the contrary by concluding that only land allotted under the General Allotment Act and thereafter patented in fee, and not land patented under other treaties or acts, thereby became taxable unless the provisions of the General Allotment Act otherwise were made explicitly applicable.* To state the matter another way, the Ninth Circuit found that if the land in question was "alienable, it is taxable" (5 F.3d at 1357), while the Sixth and Eighth Circuits found to the contrary (*Saginaw*, 106 F.3d at 130; *Leech Lake Band*, 108 F.3d at 829).

The conflict here is direct, and it is quite unlikely to be resolved by future litigation in the lower federal courts. Even superficial analysis of the three majority decisions and two dissents in the cases involved in this conflict reveals that the judges of the courts below were inexorably divided on the essential legal question presented by the Petition and on the meaning of this Court's

* The Eighth Circuit, as discussed above, took the issue one step further, holding that even land allotted expressly subject to the allotment provisions of the General Allotment Act was taxable only if allotted *after* adoption of the Burke Act.

decision in the *Yakima* case; i.e., whether section 5 of the General Allotment Act is the source of the authority of States to tax reservation fee land owned by tribes or their members. There is additionally little chance that allowing the conflict to go unaddressed will further "illuminate" the issue for the arguments do not demonstrate a progression toward a conclusion. See generally Justice Stevens, *Some Thoughts on Judicial Restraint*, 66 *Judicature* 177, 183 (1982) quoted in Robert L. Stern, et al., *Supreme Court Practice* 171 (7th ed. 1993).

The difficulties raised by the decision below are, for the reasons discussed in the preceding argument section, particularly vexing both for local officers of governments charged with taxation responsibilities and to tribal members who hold land in fee. Even if these difficulties are the price of doctrinal consistency, this Court should make clear now whether such price must be paid rather than awaiting what can only be further litigation with no less inconsistent holdings.

III

THIS COURT'S DECISION IN COUNTY OF YAKIMA CLEARLY HELD THAT ALIENABILITY EQUALS TAXABILITY.

The Amici States believe it plain that the judges of the courts of appeal appear to be in intractable conflict as to the meaning of this Court's decision in *County of Yakima*. Nonetheless, the Amici States respectfully submit that the reasoning in *County of Yakima* is because no other arrangement made any sense. Thus, *County of Yakima* concluded on the basis of *Goudy*: "[W]hen § 5 rendered

the allotted lands alienable and encumberable, it also rendered them subject to assessment and forced sale for taxes." 502 U.S. at 263-264.

The essence of the decision below is grounded in a misreading of the very next line of *County of Yakima*, which stated, "The Burke Act proviso, enacted in 1906, made this implication of § 5 explicit, and its nature more clear." 502 U.S. at 264. The court below has reasoned that because what is drawn from section 5 is but an implication, there is no "unmistakably clear congressional intent to allow state taxation." *Leech Lake Band*, 108 F.3d at 827. The flaw in the argument is its assumption that what is "implied" may not be "unmistakably clear." It was, however, "unmistakably clear" to the *Goudy* court with respect to the pre-Burke Act version of the General Allotment Act that alienability equaled taxability. See *Goudy*, 203 U.S. at 149. The contemporaneous analysis in *Goudy* of the result of making land alienable – and of how clear that result was – should certainly prevail over the latter-day analysis of court of appeals here.

Moreover, this Court in *County of Yakima* effectively found the implication to be "unmistakably clear" when it referred to a later-enacted Burke Act as a proviso which "reaffirmed for such 'prematurely' patented land what § 5 of the General Allotment Act implied with respect to patented land generally: subjection to state real estate taxes." *County of Yakima*, 502 U.S. at 264 (emphasis added) (footnote omitted). What is "reaffirmed" by necessity must have been already established.

CONCLUSION

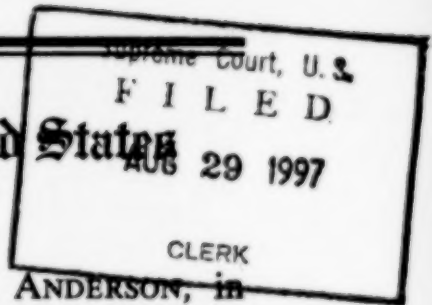
For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted

MARK W. BARNETT
Attorney General
State of South Dakota

JOHN PATRICK GUHIN
Deputy Attorney General
500 East Capitol Avenue
Pierre, South Dakota 57501-5070
(605) 773-3215
Counsel of Record

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996



CASS COUNTY, MINNESOTA; SHARON K. ANDERSON, in
her official capacity as Cass County Auditor; MARGE
L. DANIELS, in her official capacity as Cass County
Treasurer; STEVE KUHA, in his official capacity as Cass
County Assessor; JAMES DEMGEN, in his official ca-
pacity as Cass County Commissioner; JOHN STRANNE,
in his official capacity as Cass County Commissioner;
GLEN WITHAM, in his official capacity as Cass County
Commissioner; ERWIN OSTLUND, in his official capacity
as Cass County Commissioner; VIRGIL FOSTER, in his
official capacity as Cass County Commissioner,

Petitioners,
v.

LEECH LAKE BAND OF CHIPPEWA INDIANS,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF FOR LEWIS COUNTY, IDAHO;
MAHNOMEN COUNTY, MINNESOTA; LAKE COUNTY,
MONTANA; LYMAN COUNTY AND TODD COUNTY,
SOUTH DAKOTA; DUCHESNE COUNTY AND
UINTAH COUNTY, UTAH; *AMICI CURIAE*,
IN SUPPORT OF PETITIONERS,
CASS COUNTY, MINNESOTA, *ET AL.*

TOM D. TOBIN *
TOBIN LAW OFFICES, P.C.
422 Main Street
P.O. Box 730
Winner, SD 57580
(605) 842-2500
* *Counsel of Record*

[Additional Counsel Listed on Inside Cover]

KIMRON TORGERSON Lewis County Prosecuting Attorney P.O. Box 398 Nezperce, ID 83543 (208) 937-2271	DALLAS E. BROST Lyman County States Attorney P.O. Box 38 100 South Main Kennebec, SD 57544 (605) 869-2294
ERIC BOE Mahnomen County Attorney P.O. Box 439 Mahnomen, MN 56557 (218) 935-2378	ALVIN PAHLKE Todd County States Attorney P.O. Box 432 Winner, SD 57580 (605) 842-1000
DEBORAH KIM CHRISTOPHER Lake County Attorney Lake County Courthouse 106 4th Ave. E Polson, MT 59860-2125 (406) 883-7245	HERBERT WM. GILLESPIE Duchesne County Attorney 500 East 100 South P.O. Box 206 Duchesne, UT 84021 (801) 738-2435
JOANN B. STRINGHAM Uintah County Attorney 152 East 100 North Vernal, UT 84078 (801) 781-5436	

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF <i>AMICI CURIAE</i>	1
REASONS FOR GRANTING THE PETITIONS.....	4
I. THE OPINIONS OF THE COURTS OF AP- PEALS ARE CONTRARY TO A TRADITION OF TAXATION AND CONFLICT IN PRIN- CIPLE WITH THE RELEVANT DECISIONS OF THIS COURT	4
A. Introduction	4
B. The General Allotment Act Has Been Con- sistently Construed to Generally Authorize the Taxation of Fee Patent Land	8
C. The General Allotment Act Was Clearly Understood to Generally Authorize the Taxa- tion of Fee Patent Land	17
CONCLUSION	19
 APPENDIX	
Memorandum from the Associate Solicitor, Division of Indian Affairs, U.S. Dept. of the Interior dated March 22, 1979, Re Taxability of Reservation Lands Owned by Indians in Fee	1a
Excerpts of Decision of Department of the Interior, 53 I.D. 133 (1930) Re Taxation of Nez Perce Indian Allot- ments After Expiration of Trust Period	4a

TABLE OF AUTHORITIES

CASES	Page
<i>Bailess v. Paukune</i> , 344 U.S. 171 (1952)	13, 14
<i>Board of Comm'rs of Jackson County, Kansas v. United States</i> , 308 U.S. 343 (1939)	11, 12
<i>County of Thurston v. Andrus</i> , 586 F.2d 1212 (8th Cir. 1978), <i>cert. denied</i> , 441 U.S. 952 (1979)	13
<i>Draper v. United States</i> , 140 U.S. 240 (1891)	8
<i>Goudy v. Meath</i> , 203 U.S. 146 (1906)	8, 9
<i>Larkin v. Paugh</i> , 276 U.S. 431 (1928)	8
<i>Leech Lake Band of Chippewa Indians v. Cass Co., Minn.</i> , 108 F.3d 820 (8th Cir. 1997) <i>pet. for cert. filed</i> (U.S. July 8, 1997) (No. 97-174)	1, 3, 13
<i>Leech Lake Band of Chippewa Indians v. Cass Co., Minn.</i> , 908 F. Supp. 689 (D. Minn. 1995)	1
<i>Mahnomen County v. United States</i> , 319 U.S. 474 (1943)	13
<i>Moe v. Confederated Salish & Kootenai Tribes</i> , 425 U.S. 463 (1976)	8
<i>Nichols v. Rysavy</i> , 809 F.2d 1317 (8th Cir. 1987), <i>cert. denied</i> , 484 U.S. 848 (1987)	13
<i>Oneida v. Oneida Indian Nation</i> , 470 U.S. 226 (1985)	8
<i>Squire v. Capoeman</i> , 351 U.S. 1 (1956)	14
<i>Stevens v. C. I. R.</i> , 452 F.2d 741 (9th Cir. 1971)	5
<i>United States v. Mason</i> , 412 U.S. 391 (1973)	14, 15
<i>United States v. McCurdy</i> , 246 U.S. 263 (1918)	10, 11
<i>United States v. Michigan</i> , 106 F.3d 130 (6th Cir. 1997) <i>pet. for cert. filed</i> (U.S. June 30, 1997) (No. 97-14)	1, 4
<i>United States v. Michigan</i> , 882 F. Supp. 659 (E.D. Mich. 1995)	1
<i>United States v. Mitchell</i> , 445 U.S. 535 (1980)	16, 17
<i>United States v. Nice</i> , 241 U.S. 591 (1916)	9, 10, 11
<i>United States v. Rickert</i> , 188 U.S. 432 (1903)	8, 9, 10, 11
<i>Yakima County v. Yakima Indian Nation</i> , 502 U.S. 251 (1992)	<i>passim</i>

STATUTES:

General Allotment Act of 1887 (24 Stat. 388)	<i>passim</i>
Great Sioux Act of 1889 (25 Stat. 896)	7

TABLE OF AUTHORITIES—Continued

	Page
Joint Resolution of June 19, 1902 (32 Stat. 744)	5
Burke Act of 1906 (34 Stat. 182)	11, 14
Act of February 14, 1923 (42 Stat. 1246)	25
U.S.C. § 335	6
Indian Reorganization Act of 1934 (48 Stat. 984) ..	6, 8
18 U.S.C. § 1151	8
25 U.S.C. § 177	8

MISCELLANEOUS:

19 Op. Atty. Gen. 161 (1888)	17
30 L.D. 258 (1900)	17
50 L.D. 591 (1926)	17
53 L.D. 107 (1930)	17
53 L.D. 133 (1930)	17, 18
25 C.F.R. 151	6
Memorandum at 1, BIA. IA. 0943, April 21, 1989 ..	18
Memorandum Associate Solicitor, Division of Indian Affairs, Dept. of the Interior, March 22, 1979	4
Brief for the United States, <i>Bailess v. Paukune</i> , 344 U.S. 171 (1952) (No. 242)	13
Brief for the United States, <i>Board of Comm'rs of Jackson County, Kansas v. United States</i> , 308 U.S. 343 (1939) (No. 1728)	11
Brief for the United States, <i>Leech Lake Band of Chippewa Indians v. Cass Co., Minn.</i> , 108 F.3d 820 (8th Cir. 1997) (No. 95-4263)	5, 6, 7
Respondent's Brief in Opposition, <i>Leech Lake Band of Chippewa Indians v. Cass Co., Minn.</i> , 108 F. 3d 820 (8th Cir. 1997) (No. 95-4263)	7
Brief for the United States, <i>Mahnomen County v. United States</i> , 319 U.S. 474 (1943) (No. 684)	13
Brief for the United States, <i>United States v. Mason</i> , 412 U.S. 391 (1973) (No. 72-654, 72-606)	15
Brief for the United States, <i>United States v. McCurdy</i> , 246 U.S. 263 (1918) (No. 685)	10
Brief for the United States, <i>United States v. Mitchell</i> , 445 U.S. 535 (1980) (No. 81-1748)	16

TABLE OF AUTHORITIES—Continued

	Page
Brief for the United States, <i>Nice v. United States</i> , 241 U.S. 591 (1916) (No. 681)	9
Brief for the United States, <i>United States v. Rickert</i> , 188 U.S. 432 (1903) (No. 216)	9
Brief for Petitioner, <i>Squire v. Capoeman</i> , 351 U.S. 1 (1956) (No. 134)	14
Brief for the United States as <i>Amicus Curiae</i> , <i>Yakima County v. Yakima Indian Nation</i> , 502 U.S. 251 (1992) (Nos. 90-408, 90-577)	1, 7, 8
Memorandum for the United States as <i>Amicus Curiae</i> in Support of Petition for Rehearing and Suggestion for Rehearing <i>En Banc</i> , <i>Yakima Indian Nation v. County of Yakima</i> , 960 F.2d 793 (9th Cir. 1992) (No. 88-3926)	1
Brief for La Plata County, Colorado, et al. as <i>Amici Curiae</i> in Support of Petitioners, <i>Yakima County v. Yakima Indian Nation</i> , 502 U.S. 251 (1992) (Nos. 90-408, 90-577)	2
Transcript of Oral Argument, <i>United States v. Mason</i> , 412 U.S. 391 (1978) Nos. 72-654, 72-606)	15
Transcript of Oral Argument, <i>United States v. Mitchell</i> , 445 U.S. 535 (1980) (No. 81-1748)	16
Transcript of Oral Argument, <i>Yakima County v. Yakima Indian Nation</i> , 502 U.S. 251 (1992) (Nos. 90-408, 90-577)	7
F. Cohen, Handbook of Federal Indian Law (1942 ed.)	6
F. Cohen, Handbook of Federal Indian Law (1982 ed.)	6
Conference of Western Attorneys General, <i>American Indian Law Deskbook</i> (1993)	6

INTEREST OF *AMICI CURIAE*¹

Thus, if the Court agrees with the position of *either* party in this case, its legal ruling would be *dispositive* of this and other *pending* and *future cases*, and therefore would *obviate the need for potentially protracted and complex litigation* regarding the impact of real estate taxes on a case-by-case basis . . . we urge the Court to grant review now . . . and thereby to resolve a question of recurring importance on Indian reservations.

Brief for the United States as *Amicus Curiae* at 8, *Yakima County v. Yakima Indian Nation*, 502 U.S. 251 (1992) (Nos. 90-408, 90-577) (emphasis added).

By Order of January 7, 1991, this Court invited the Solicitor General to file a brief expressing the views of the United States in *Yakima County v. Yakima Indian Nation*, 502 U.S. 251 (1992). In response, the United States urged this Court to grant review for the broad policy reasons noted in the above quotation.² After this Court granted the petition, the United States, of course, sup-

¹ The text of this *amici curiae* brief of the Counties is submitted in both *Leech Lake Band of Chippewa Indians v. Cass Co., Minn.*, 108 F.3d 820 (8th Cir. 1997) *petition for cert. filed* (U.S. July 8, 1997) (No. 97-174) and in *United States v. Michigan*, 106 F.3d 130 (6th Cir. 1997) *petition for cert. filed* (U.S. June 30, 1997) (No. 97-14). In both instances, the opinions of the district courts more accurately reflect the views expressed in *Yakima County v. Yakima Indian Nation*, 502 U.S. 251 (1992). *United States v. Michigan*, 882 F. Supp. 659 (E.D. Mich. 1995), *Leech Lake Band of Chippewa Indians v. Cass Co., Minn.*, 908 F. Supp. 689 (D. Minn. 1995).

² Earlier, the United States repeatedly told the Ninth Circuit Court of Appeals the same thing:

The issue is important.—The issue is of *great importance* to Indians on reservations *throughout* the United States . . . applies to the *vast majority* of Indian reservations in the United States. . . The *broad importance* of the decision to reservation Indians. . . .

Memorandum for the United States as *Amicus Curiae* in Support of Petition for Rehearing and Suggestion for Rehearing *En Banc* at 1, 2, *Yakima*, 960 F.2d 793 (No. 88-3926) (emphasis added).

ported the position of the Indian tribes and, on the merits, their views were squarely rejected.

Contrary to the express representation to this Court, the United States then proceeded, as a party or as *amicus curiae* in other cases across the country, to continue to support additional litigation of this kind. In these cases, the United States maintained that *Yakima* should be narrowly construed and severely restricted in application. As a result, the concerns that prompted the filing of the *amici curiae* brief by the Counties in the *Yakima* case have only been exacerbated.

The tax records in county court houses are being rifled. Since 1987, tribal governments across the country, with the assistance and encouragement of the United States, have challenged the validity of county ad valorem taxes on Indian fee lands . . . As a result, members of tribes have refused to pay their taxes . . . tax abatement petitions have been filed . . . individual lawsuits have been filed against counties in State courts . . . tribal lawsuits have been filed against counties in federal courts . . . and even worse, the United States, just a year ago, after the decision below, targeted one *Amici* county and sued the county and the State in federal court in the name of the United States. . . . (Federal complaint with attachments; one inch thick, burdensome interrogatories and requests for production of documents). Apart from the fact that county governments can ill afford to squander scarce resources on senseless litigation, the issue here threatens the very core of county fiscal integrity.

Brief for La Plata County, Colorado, et al. as *Amicus Curiae* in Support of Petitioners at 1, *Yakima* (Nos. 90-408, 90-577).

As in *Yakima*, the Counties joining in this Brief all contain areas that at one time were established as Indian reservations. They are representative of many other counties similarly situated throughout the United States. As this Court has often noted, fee lands are scattered through-

out the counties, some of which are owned by Indians and Indian tribes. The history of each area is, of course, as varied and diverse as federal Indian policy—with one exception. Historically, every county has routinely taxed these fee lands and this practice has been the accepted rule for decades.

To be sure, the extent of Indian fee ownership varies from reservation to reservation and reflects radically different fact situations. Locally, tribal enrollment lists are not ordinarily available to county governments and even these lists do not include non-member Indians, who also own fee property. So we are not certain of the total sum involved. One thing, however, is certain. The amount is substantial—because these counties also contain large areas of other lands that are non-taxable and held in trust by the United States for Indians and Indian tribes. For example, in one county, approximately 60 percent of the entire county is held in trust by the United States for the tribe or its members or other Indians. Of the taxable land, Indian fee land on paper roughly constitutes more than 15 percent of the seven hundred and fifty thousand (\$750,000) to eight hundred and fifty thousand (\$850,000) dollars of total taxes collected by the county per year in recent years. In another county, the same figure represents roughly 8 percent of the total taxes collected. In other counties the percentage could be more and in some counties it is undoubtedly less. But the exact percentage is beside the point. Whatever the amount, county government in these areas is not some new and novel experience. It has been there for decades pursuant to Congressional Policy. That Congressional Policy has authorized the taxes here—and not simply on a restricted case by case basis, as two out of the three courts of appeals have indicated.

The issue in these cases represents a fundamental and most basic concept in federal Indian law that has been resolved and relied on for decades. For this additional reason, the Counties respectfully submit that this Court grant the petitions for writs of certiorari in both *Leech*

Lake Band of Chippewa Indians v. Cass Co., Minnesota, 108 F.3d 820 (8th Cir. 1997) petition for cert. filed (U.S. July 8, 1997) (No. 97-174) and in *United States v. Michigan*, 106 F.3d 130 (6th Cir. 1997) petition for cert. filed (U.S. June 30, 1997) (No. 97-14).

REASONS FOR GRANTING THE PETITIONS

I. THE OPINIONS OF THE COURTS OF APPEALS ARE CONTRARY TO A TRADITION OF TAXATION AND CONFLICT IN PRINCIPLE WITH THE RELEVANT DECISIONS OF THIS COURT.

The Counties fully support the reasons for granting the petitions set forth in the petitions and in the brief of supporting *amici curiae* States. The Counties recognize that the primary considerations governing review will focus on the conflict among the circuits and the conflict with the decision of this Court in *Yakima*. The Counties further submit that the decisions of the panels conflict substantially with other related decisions of this Court and a tradition of taxation. This brief will focus on that tradition and highlight those decisions.

A. Introduction.

In order to place the taxation of fee lands issue in historical context, one need first refer to the fact that until 1989, nearly everyone, including the United States, acted upon the recognition that such taxes were clearly permissible. The Counties have appended the opinion of the Associate Solicitor, Division of Indian Affairs, of the Department of the Interior Memorandum dated March 22, 1979. Co. App. 1a-3a.

In fact, this is the reason that the decisions below do not cite any other opinions that have reached the tax exempt conclusion. There are none. These decisions represent the first time any Courts of Appeals have ever held that ordinary fee lands owned by Indian tribes or their members are not taxable—not an insignificant point.

Again, the United States is, in large part, responsible for this radical departure from tradition and precedent.

For this reason, a few preliminary observations regarding the arguments the United States submitted below are in order. First, although the United States flaunts its "expertise in Indian law matters" (Brief for the United States at 1, *Leech Lake Band of Chippewa Indians v. Cass Co., Minn.*, 108 F.3d 820 (8th Cir. 1997) (No. 95-4263)), the United States never acknowledges that:

1. Most of the arguments relied upon by the United States have been just slightly revised from those submitted by the United States in *Yakima* and rejected by this Court.

2. No court of appeals had ever adopted the argument of the United States.

3. A century of agency opinions and congressional action detract from the argument of the United States.

4. A 1902 Congressional Resolution and a 1923 Act of Congress were passed to extend the scope of the General Allotment Act of 1887, 24 Stat. 388 (*see generally Stevens v. C. I. R.*, 452 F.2d 741 (9th Cir. 1971)):

Insofar as not otherwise specially provided, all allotments in severalty to Indians, outside of the Indian Territory, shall be made in conformity to the provisions of the Act approved February eighth, eighteen hundred and eighty-seven, entitled "An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," and the other general Acts amendatory thereof or supplemental thereto, and shall be subject to all the restrictions and carry all the privileges incident to allotments made under said Act and other general Acts amendatory thereof or supplemental thereto.

Joint Resolution of June 19, 1902, 32 Stat. 744.

That unless otherwise specifically provided, the provisions of the Act of February 8, 1887 (Twenty-fourth Statutes at Large, page 388), as amended, be, and they are hereby, extended to all lands heretofore

purchased or which may hereafter be purchased by authority of Congress for the use or benefit of any individual or band or tribe of Indians.

Act of February 14, 1923, 42 Stat. 1246, 25 U.S.C. § 335.

5. Provisions in the Indian Reorganization Act of 1934, 48 Stat. 984, and related regulations at 25 C.F.R. 151 detract from the arguments of the United States.

6. The original edition of Felix Cohen's Handbook of Federal Indian Law at 258-261, undermines the arguments of the United States (this segment also undermines the Non-Intercourse Act argument that the United States again submits).

7. The 1982 Handbook of Federal Indian Law supports the United States, but that those arguments were submitted by the United States and rejected in *Yakima*.³

In other instances, the argument of the United States is seriously misleading. For example, the following "omission" assertion appears at page 29 in the brief the United States submitted in *Leech Lake*:

Yakima did not, however, address the immunity enjoyed by tribally-owned land. This omission likely stems from the Court's primary focus on individual Indian ownership of fee lands in that case.

Brief for the United States at 19, *Leech Lake*, 108 F.3d 820 (No. 95-4263) (emphasis added).

The United States should know better. The "Question Presented" in the Brief for the United States in *Yakima* was carefully drafted in this respect:

Whether Yakima County may impose its ad valorem tax on real property situated within the boundaries of the Yakima Indian Reservation that is owned in

³ The original Cohen text (and the subsequent revisions) have been viewed by some as tribal advocacy works. See Conference of Western Attorneys General. American Indian Law Deskbook at xiii-xv (1993).

fee by the *Yakima Nation* or individual members of the Yakima Nation.

Brief for the United States as Amicus Curiae at I, *Yakima*, 502 U.S. 251 (Nos. 90-408, 90-577) (emphasis added).

Further, tribal ownership was discussed throughout the briefs and noted on four separate occasions in the text of the *Yakima* opinion. *Yakima*, 502 U.S. at 256, 264, n.4. See also Transcript of Oral Argument at 4, 18 and 28, *Yakima* (No. 90-408; 90-577).

Finally, at other times, the United States inadvertently undermines the position of the Leech Lake Band. For example, in this instance, the Leech Lake Band would like this Court to think that the Nelson Act was unusual and atypical in every respect. Respondent's Brief in Opposition, *Leech Lake*, 108 F.3d 820 (No. 95-4263). On the other hand, the United States routinely recognizes that:

The Nelson Act, ch. 24, 25 Stat. 642, was one of a series of allotment acts passed by Congress after the passage of the General Allotment Act of 1887, 24 Stat. 388.

Brief for the United States at 2, *Leech Lake*, 108 F.3d 820 (No. 95-4263).

In this case, the United States is undoubtedly correct. For example, see the Great Sioux Act of 1889, 25 Stat. 896, where the General Allotment Act was, like the Nelson Act, simply tailored to the specific situation existing in the State at issue.

In short, the United States recognized early on in the *Yakima* litigation that the General Allotment Act was a statute of general applicability, amended on several occasions to further reflect its universal application, and in some instances, as in Minnesota, specifically incorporated by express reference in the text of related legislation dealing with allotments required by previous legislative formats. Accordingly, *Yakima* was thoroughly briefed on both sides in recognition of this fundamental understanding, with the United States (and 25 different tribes from

across the country) submitting dozens of arguments in their briefs to preclude the taxation of fee lands. As *Yakima* attests, this Court, with one dissent, rejected these ad valorem tax exemption claims.

While it is not necessary for any Opinion to address each and every argument that is not deemed persuasive, the assumption that this Court in *Yakima* did not address or consider all arguments of substance would be especially unwarranted in this instance. The United States and others filed *exhaustive* briefs detailing every conceivable argument in support of a tribal tax exemption on fee lands (including the *Goudy v. Meath*, 203 U.S. 146 (1906) has been overruled argument, the *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976) argument, the 1934 Indian Reorganization Act argument, the 18 U.S.C. § 1151 Indian Country argument, and the 25 U.S.C. § 177 argument⁴)—all of which were rejected. In *Yakima*, as in other recent cases, the position of the United States was simply tailored to support the arguments of Indian tribes. And this is the perspective from which the opinions of the courts of appeals that have adopted those arguments in these cases should be viewed.

B. The General Allotment Act Has Been Consistently Construed to Generally Authorize the Taxation of Fee Patent Land.

As we noted in *Yakima*, although this Court generally discussed the General Allotment Act in *Draper v. United States*, 140 U.S. 240 (1891), it was not until 1903 that a tax related issue reached this Court in *United States v. Rickert*, 188 U.S. 432 (1903). There, the United States correctly headed its argument with the proposition that “the lands of the Indian allottees are not taxable under

⁴ Immunity of Indian lands from state taxation and control is at the very core of federal Indian policy. See *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1983); 25 U.S.C. § 177. Brief for the United States as *Amicus Curiae* at 12, *Yakima*. See also *Larkin v. Paugh*, 276 U.S. 431, 433-434 (1928).

the authority of the State *during* the trust period” and concluded that improvements were similarly “exempt from taxation *during* the trust period that the land is so exempt, such improvements being in legal contemplation land.” Brief for the United States at 15, 42, *Rickert* (No. 216) (emphasis added). The *Rickert* opinion reflects this representation:

[N]o power in the State of South Dakota, for state or municipal purposes, to assess and tax the lands in question *until* at least the fee was conveyed to the Indians. . . . While the title to the land remained in the United States, the permanent improvements, could no more be sold for local taxes than could the land to which they belonged.

Rickert, 188 U.S. at 437, 442 (emphasis added).

A few years later, in *Goudy v. Meath*, 203 U.S. 146 (1906), a related issue was generally discussed and decisively resolved. The *Goudy* alienation argument, addressed in detail by others, need not be repeated here.

In *United States v. Nice*, 241 U.S. 591 (1916), a case involving a federal prosecution for the sale of liquor to a tribal member with a 1902 trust patent, the United States only indirectly touched on this aspect of the General Allotment Act and the status of the individual:

[C]ongress by this very act of 1887 expressly retained control over the allottee Indian's land *by restrictions of alienation and trusteeship*. . . . The State, having *no power to tax* these Indian [trust] allotments, had no particular interest in the Indian's welfare. . . . [I]t was well established that State laws relating to *taxation* of his [trust] property did not apply. . . .

Brief of the United States at 26, 21, 12, *Nice* (No. 681) (emphasis added).

The Court in *Nice* referred to this aspect of the General Allotment Act when it described the holding in *Rickert*:

The act of 1887 came under consideration in *United States v. Rickert*, 188 U.S. 432, a case involving the power of the State of South Dakota to tax allottees under that act, according to the laws of the State, upon their allotments, the permanent improvements thereon and the horses, cattle and the other personal property issued to them by the United States and used on their [trust] allotments, and this court, after reviewing the provisions of the act and saying, p. 437, "These Indians are yet wards of the Nation, in a condition of pupilage or dependency, and have not been discharged from that condition," held that the State was *without power to tax* the [trust] lands and other property, because the same were being held and used in carrying out a policy of the Government. . . .

Nice, 241 U.S. at 600-601 (emphasis added).

Two years later, the United States was more succinct when it argued another tax exemption issue in *United States v. McCurdy*, 246 U.S. 263 (1918):

Partial emancipation from the Federal guardianship, accompanied by restricted ownership of land *for a limited period*, as a method of educating and preparing the Indians for the duties of civilized life, was adopted by Congress at an early date and has become a settled national policy. . . . In *United States v. Rickert*, 188 U.S. 432, it was decided that *trust* allotments and personal property issued to Indian allottees could not be taxed by a State because this would be "to tax an instrumentality employed by the United States for the benefit and control of this dependent race. . . ."

Brief for the United States at 9, 11, 12. *McCurdy* (No. 685) (emphasis added).

In *McCurdy*, the United States argued that land purchased with trust funds for an Osage Indian, as evidenced by a restrictive deed, should not be taxable by the State of Oklahoma. The *McCurdy* Opinion rejected the tax exemption argument of the United States in no uncertain

terms. At the same time, the Court clearly restated the basis of *Rickert*:

There is also a *clear distinction* between the present case and those like *United States v. Rickert*, 188 U.S. 432, 23 Sup.Ct. 478, 47 L.Ed. 532, where it was sought to tax property, *the legal title of which was in the United States* and which was held by it for the benefit of Indians.

McCurdy, 246 U.S. at 272 (emphasis added). Nothing in *United States v. Nice*, was argued or cited by the United States and *Nice* did not figure in the Opinion of the Court in *McCurdy*, and correctly so.

A case more directly on point reached this Court in 1939. In *Board of Comm'rs of Jackson County, Kansas v. United States*, 308 U.S. 343 (1939), the United States equated a General Allotment Act trust patent with the exemption from taxation:

The *trust patents* issued in fulfillment of that treaty and pursuant to the General Allotment Act of 1887 [24 Stat. 388 (sec. 5), as amended by Act of May 8, 1906, c. 2348, 34 Stat. 182] bound by the United States to convey the land "free of all charge or incumbrance whatever" at the end of the *trust period*. *Such* [trust] *patents* have uniformly been construed to grant to the Indians a broad exemption from all forms of taxation effecting the land.

Brief for the United States at 6-7, *Board of Comm'rs of Jackson County, Kansas v. United States*, 308 U.S. 343 (1939) (No. 1728) (emphasis added).

Although *Board of Comm'rs of Jackson County, Kansas* only involved the question of whether interest should be awarded when taxes were erroneously assessed, the opinion mentions the General Allotment Act and reflects the understanding of that time:

The land which gave rise to this controversy, situated in Jackson County, Kansas, was [trust] patented under the General Allotment Act of February 8,

1887, 24 Stat. 388, 25 U.S.C. § 348. In pursuance of this Act, the United States agreed to hold the land for twenty-five years under the restrictions of the 1861 Treaty, subject to extension at the President's discretion. . . .

In this legislative setting, the Secretary of the Interior in 1918, over the objection of M-Ko-Quah-Wah, cancelled her outstanding *trust patent* and in its place issued a *fee simple patent*. This was duly recorded in the Registry of Deeds for Jackson County. In consequence Jackson County in 1919 began to subject the land to its *regular property taxes*. It continued to do so as long as this *fee simple patent* was left undisturbed by the United States. . . . Jackson County in all innocence acted in reliance on a *fee patent* given under the hand of the President of the United States. . . . Here is a long, unexcused delay in the assertion of a right for which Jackson County should not be penalized. By virtue of the *most authoritative semblance of legitimacy under national law*, the land of M-Ko-Quah-Wah and the lands of other Indians had become part of the economy of Jackson County. For eight years after Congress had directed attention to the problem, those specially entrusted with the intricacies of Indian law did not call Jackson County's action into question. Whatever may be her unfortunate duty to restore the taxes which she had *every practical justification* for collecting at the time, no claim of fairness calls upon her also to pay interest for the use of the money which she *could not* have known was not *properly* hers.

Board of Comm'rs, 308 U.S. at 348-349, 352-353 (emphasis added).

In 1943, in a most instructive case that involved a special modification of the twenty-five year trust limitation of the General Allotment Act, the United States recounted to this Court that the General Allotment Act "has been *uniformly construed* as conferring upon the Indians a vested 25-year tax exemption. . . ." and the United

States conceded that subsequent to that period, the land was legally taxable. Brief for the United States at 17, 43, *Mahnomen County v. United States*, 319 U.S. 474 (1943) (No. 684) (emphasis added). The *Mahnomen* decision reflects this important concession in no uncertain terms:

It is *conceded* that any limitation on the County's power to tax *expired* in 1928 with the termination of the twenty-five year trust described below.

Mahnomen, 319 U.S. at 475 (emphasis added).

Most of the important early cases of this Court are discussed in detail in the Brief for the United States, *Mahnomen*, No. 684. Although *Mahnomen* is a Minnesota case decided by this Court, and although it specifically deals with the Nelson Act and the taxation of real property owned by tribal members, the United States neglected to cite or discuss it in the court of appeals. Similarly, the court of appeals mentioned *Mahnomen* only in passing, as a case that simply "suggested that the land might only be free from taxation during the original trust period," and then cited the dissent for that proposition. *Leech Lake Band of Chippewa Indians v. Cass County, Minnesota*, 108 F.3d 820, 823 (8th Cir. 1997), Pet. App. 6. In this respect, the decision of the panel majority is in further conflict with a decision of this Court, as a thorough reading of *Mahnomen* attests.⁵

In 1952, the United States in *Bailess v. Paukune*, 344 U.S. 171 (1952), generally described two instances where it deemed taxation to be "forbidden by the General Allotment Act":

[W]hether *under trust patents* or *under fee patents with restrictions* upon alienation. . . .

Brief for the United States at 2, *Bailess v. Paukune* (No. 242) (emphasis added).

⁵ See also *Nichols v. Rysavy*, 809 F.2d 1317 (8th Cir. 1987), cert. denied, 484 U.S. 848 (1987), and *County of Thurston v. Andrus*, 586 F.2d 1212 (8th Cir. 1978), cert. denied, 441 U.S. 952 (1979).

Bailess involved the taxation of land of an allegedly Indian widow, who in due course was to receive a "fee patent" for the interest she inherited from her husband in a trust allotment. The Court concluded her interest was taxable if she was a non-Indian and in the process noted:

This allotment was made under the General Allotment Act of February 8, 1887, 24 Stat. 388, 389. . . . No fee patent to the land has issued to *Paukune*, to his widow, or to the son. The trust period of twenty-five years has from time to time been extended. In other words, the United States still holds the land in trust for *Paukune* and his heirs. . . .

Bailess, 344 U.S. at 171-172 (emphasis added).

In 1956, in an income tax case that involved the General Allotment Act, as amended by the Burke Act of 1906, 34 Stat. 182, the United States succinctly stated that:

[T]his provision was undoubtedly intended to make it clear that Indian lands transferred in fee to the Indians would thereafter be subject to state and local taxation. . . .

Brief for the Petitioner at 13 n.4, *Squire v. Capoeman*, 351 U.S. 1 (1956) (No. 134) (emphasis added). The opinion of the Court accepted the basic premise of the argument:

The Government argues that this amendment was directed solely at permitting state and local taxation after a transfer in fee, but there is no indication in the legislative history of the amendment that it was to be so limited. . . . The literal language of the proviso evinces a congressional intent to subject an Indian allotment to all taxes only after a patent in fee is issued to the allottee.

Squire, 351 U.S. at 7-8 (emphasis added).

In 1973, in *United States v. Mason*, 412 U.S. 391 (1973), the United States noted that the Court in *Squire*:

[R]elied on language in an amendment to the General Allotment Act providing for taxation of the land after the allottee receives a patent in fee . . . [and] held that an amendment to the General Allotment Act created a tax exemption by implication, and that it required the return of the trust property without encumbrances at the end of the trust period . . . and provided for taxation after the termination of the trust.

Brief for the United States at 9-10, 17, *United States v. Mason*, 412 U.S. 391 (1973) (Nos. 72-654, 72-606) (emphasis added). The Court in *Mason* agreed:

Moreover, the *Squire* decision rested heavily on the provision in the General Allotment Act providing for the removal of 'all restrictions as to sale, encumbrance, or taxation' when Indian property is granted in fee. . . .

Mason, 412 U.S. at 396 (emphasis added). Even Mr. Hobbs, arguing for the tribal respondents in oral argument, stated:

The next thing that happens is that in 1906 Congress amends the General Allotment Act, and it says that—for the first time adds the idea that the trust period can end sooner than the 25 years intended if the Indian becomes competent sooner than that time. And it says that after he reaches the point of competency, the trust will end and he gets his land, and all restrictions as to alienation and taxation are lifted. This implies that Congress thought that the land was free of tax up to that point and well so. Over sixty years ago this Supreme Court, in 1903, had held that a restriction on alienation added up to a tax exemption. So, Congress assumed on very good authority in 1906 that the restriction on alienation was the equivalent of a tax exemption.

Tr. of Oral Argument at 38, *United States v. Mason*, 412 U.S. 391 (1978) (Nos. 72-654, 72-606) (emphasis added).

Most recently, in *United States v. Mitchell*, 445 U.S. 535 (1980), the United States reviewed the entire history of the General Allotment Act. Again, the United States told this Court the exemption to state taxation coincided with the trust period:

The General Allotment Act . . . for the limited purposes of (a) restraining improvement alienation of the land by the allottees and (b) affording an immunity from state taxation for the period *during* which the legal title remained in the United States. . . .

Brief for the United States at 24, *Mitchell* (No. 81-1748) (emphasis added). In oral argument, Mr. Claiborne, arguing for the United States, said the same thing:

That statute contemplated a scheme whereby the land of the reservaton would be divided among the Indians within 25 years, and in the *meantime*, the United States was simply to hold title in trust solely for the *purpose* of preventing state taxation, it being legal title in the United States and therefore exempt from state taxation.

Tr. of Oral Argument at 14, *United States v. Mitchell*, 445 U.S. 535 (1980) (No. 81-1748) (emphasis added). This Court agreed:

[W]hen Congress enacted the General Allotment Act, it intended . . . to prevent alienation of the land and to ensure that allottees would be immune from state taxation.

Mitchell, 445 U.S. at 544. At the end of this conclusion, the Court quoted at length and added emphasis to the remarks of Representative Skinner, the sponsor in the House of Representatives: ". . . 'land is made *inalienable and non-taxable for a sufficient length of time.*'" *Mitchell*, 445 U.S. at 544, n.5 (emphasis as in original except for a sufficient length of time). In dissenting, Justice White described the holding of the Court in the same terms:

The Court holds, however, that the 'trust' established by § 5 is not a trust as that term is commonly understood, and that Congress had no intention of imposing full fiduciary obligations on the United States. Congress' purposes, it is said, were narrower: to impose a restraint on alienation by Indian allottees while ensuring *immunity from state taxation during the period* of the restraint.

Mitchell, 445 U.S. at 546, 547 (White, J., dissenting) (emphasis added). It is significant that the arguments the United States submitted in *Mitchell* were presented subsequent to the decisions of this Court that the United States now advances to undermine the same position.

C. All Related Opinions Reflect That The General Allotment Act Was Clearly Understood to Generally Authorize the Taxation of Fee Patent Land.

Immediately after the passage of the 1887 Act, the Secretary of the Interior requested and received an opinion from the Attorney General of the United States. Among other things, this opinion clearly ties the tax exemption to the twenty-five year trust period.

I am also of the opinion that the allotment lands provided for in the act of 1887 are exempt from State or Territorial taxation upon the ground above stated with reference to the act of 1884, namely, that the lands covered by the act are held *by the United States for the period of twenty-five years in trust for the Indians*, such trust being an agency for the exercise of a Federal power, and therefore outside the province of State or Territorial authority.

19 Op. Atty. Gen. 161, 169 (1888) (emphasis added). Later, opinions from the Department of the Interior reinforced this accepted construction. 30 L.D. 258, 266-267 (1900), 50 L.D. 591 (1924), 53 L.D. 107 (1930), 53 L.D. 133 (1930). With specific reference to the original Nez Perce Indian Reservation, in 1930 the Interior Solicitor characterized the issue as follows:

[T]he subsequent enactment of the general allotment act of 1887, embracing within its scope reservations such as the Nez Perce, created by treaty stipulation, and the making of allotments thereunder to the Indians with their consent as manifested, not only by the selections made by them, but by the subsequent agreement of 1894, make it plain that the provisions of the original treaty of 1863 relied upon as creating the tax exemption here claimed, were superseded by the provisions of the general allotment act.

The rights of the Nez Perce Indians with respect to the lands allotted to them, are thus determined by the general allotment act of 1887 and as that act contains no provision exempting the allotted lands from taxation after issuance of fee simple patents upon expiration of the trust period, I am clearly of the opinion that such lands thereupon become subject to the taxing power of the State.

53 L.D. 133, 136 (1930), Co. App. 6a.

This construction of the 1887 Act is repeatedly reflected in every related opinion of the Department of the Interior thereafter until 1989. On April 21, 1989, the 1979 opinion that restated this position was simply rescinded. After citing several cases decided by this Court in the 1970s, an Associate Solicitor of the Department of the Interior reasoned that:

[L]anguage in some of those decisions suggests the state is on weaker ground when it attempts to tax Indian ownership of land. . . .

Memorandum at 1, BIA. IA. 0943, April 21, 1989. The decision of this Court in *Yakima* authoritatively resolved that question.

CONCLUSION

Predictably, the United States will advance several reasons for this Court to wait for "another day" to review the questions presented in the Petitions. Nevertheless, for the foregoing reasons, and those stated in the Petitions and supporting *amici* brief of the States, the Petitions for Writs of Certiorari should be granted.

Respectfully submitted,

TOM D. TOBIN *
TOBIN LAW OFFICES, P.C.
422 Main Street
P.O. Box 730
Winner, SD 57580
(605) 842-2500
* *Counsel of Record*

August 29, 1997

APPENDIX

APPENDIX

**UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240**

Mar. 22, 1979

Memorandum

To: Field Solicitor, Twin Cities

From: Associate Solicitor, Division of Indian Affairs

Subject: Taxability of Reservation Lands Owned by
Indians in Fee

I am unable to agree with the position taken in the research paper enclosed with your memorandum of January 25, *i.e.*, that Indian-owned fee land within reservations is exempt from state and local real property taxation.

The research paper relies primarily on the principle of federal preemption of state power to tax, correctly stating that this method of analysis is the preferred one where state taxation questions are at issue. However, a fundamental aspect of the principle that Congress may preempt state taxation of Indians is that Congress may also give permission to the states to tax Indians or Indian property. Such permission has been given, with respect to real property taxation of fee lands, in 25 U.S.C. § 349.

In *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), the Supreme Court held that Indians within reservation boundaries are immune from state personal property taxes, vendor license fees, and cigarette sales taxes. In that case, the Court considered the general language in the part of 25 U.S.C. § 349 which provided that, upon the issuance of fee patents, allottees would become subject to *all* civil and criminal laws of the state. It found that this part of § 349 has been modified by or

at least requires interpretation in light of later legislation dealing with jurisdictional matters. This later legislation, the Court said, manifests Congressional intent to eschew checkerboard jurisdiction. Thus, the taxes at issue in *Moe*, which are civil laws of the state and fall within the scope of the first part of § 349, are inapplicable to Indians anywhere within reservation boundaries, regardless of the title status of land.

However, the same conclusion may not automatically be reached with respect to real property taxes, because those taxes are specifically addressed in a later part of § 349. The first proviso to that section provides in part that:

"[T]he Secretary . . . may . . . cause to be issued to [an] allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of such land shall be removed. . . ."

The Supreme Court did not address this provision in *Moe*. In light of the specific taxing permission contained in the proviso, the Court's holding in *Moe* may not be extended to real property taxes, in the absence, at least, of a showing that the conditions existing with respect to those taxes are the same as those which led the Court to its conclusion in *Moe*, i.e., that subsequent legislation has modified this part of § 349.

I do not believe it can be said that the taxing permission in this proviso has been modified by later legislation. Rather than legislating in a manner inconsistent with it, Congress, since the General Allotment Act, clearly appears to have acted upon the assumption that land owned by Indians in fee is taxable. Subsequent legislation relating to land acquisition or sale, where taxation is mentioned, generally equates tax-exemption with trust or restricted status. *E.g.*, 25 U.S.C. 409a, 412a, 465, 501, 403-1; Act of July 24, 1956, 70 Stat. 626, § 3.

Section 349 applies, by its terms, to patents in fee issued for allotments. The Act of February 14, 1923, 25 U.S.C.

§ 335, extended the provisions of the General Allotment Act, including 25 U.S.C. § 349, to "all lands heretofore purchased or which may be purchased by authority of Congress for the use and benefit of any individual Indian or band or tribe of Indians." That statute has been construed to encompass lands purchased and taken in trust for individual Indians within the tax-exemption benefits of the General Allotment Act. *Stevens v. Comnr. of Internal Revenue*, 452 F.2d 741 (9th Cir. 1971).

Likewise, I think the taxing permission in § 349 must be construed to apply to purchased land, certainly where land is purchased and taken in trust, and for which a patent in fee is later issued. Although it might conceivably be argued that land purchased in fee and not taken into trust does not fall within this permission, I think it is clear that the General Allotment Act and subsequent legislation, taken together, manifest Congressional understanding and intent that tax-exempt status of Indian land depend upon its being trust or restricted land.

Your § 2415 cases which depend upon a theory of non-taxability of fee land should be removed from your case list.

/s/ Thomas W. Fredericks
THOMAS W. FREDERICKS

**EXCERPTS OF DECISION OF DEPARTMENT OF THE
INTERIOR, 53 I.D. 133 (1930) RE TAXATION OF
NEZ PERCE INDIAN ALLOTMENTS AFTER
EXPIRATION OF TRUST PERIOD**

Opinion June 30, 1930

NEZ PERCE INDIAN LANDS—ALLOTMENT—TAXATION.

The provision in the treaty of June 9, 1863, concluded with the Nez Perce Indians, for the allotment of lands in Idaho to individuals of that tribe, was, by the stipulations of the later agreement of August 25, 1894, superseded by the general allotment act of February 8, 1887, and the tax exemption of the allotted lands created by the treaty was abrogated.

**NEZ PERCE INDIAN LANDS—ALLOTMENT—PATENT—
TAXATION.**

Upon the issuance of fee simple patents following the expiration of the 25 year trust period provided for in the general allotment act, the lands allotted to members of the Nez Perce Tribe of Indians become subject to taxation by the State in the same manner as property belonging to other citizens. *Goudy v. Meath* (203 U. S. 146), and *Larkin v. Paugh* (170 U. S. 431).

FINNEY, *Solicitor*:

You [Secretary of the Interior] have requested my opinion as to whether the lands allotted to the members of the Nez Perce Tribe of Indians in Idaho become subject to taxation by the State upon the issuance of fee simple patents therefor, following expiration of the 25 year trust period provided for in the acts under which these Indians were allotted.

The Nez Perce Indians were allotted lands in severalty pursuant to the provisions of the general allotment act of

February 8, 1887 (24 Stat. 388), and for the lands so allotted the allottees received patents of the form and legal effect provided in section 5 of that act which reads—

That upon the approval of the allotments provided for in this Act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period. * * *

The United States, under the foregoing provision, retained the legal title, giving the allottee a paper or writing inaptly termed a patent (*United States v. Nice*, 241 U. S. 591, 595), showing that at a particular time in the future, unless it was extended by the President, the allottee or his heirs, as the case might be, would be entitled to a regular patent, conveying the fee discharged of the trust and free of all charge and incumbrance. The United States thus retained its hold upon the land for a period of 25 years and as much longer as the President in his discretion might determine. While the statute contains no express provision with respect to taxation of the land during or after the expiration of the trust period, the intent of Congress in that regard is plain. During the restricted or trust period, the land is held by the United States for the allottee or his heirs, as a part of the general policy of dealing with the Indians and is being administered as a governmental instrumentality. While so held and

administered, no power rests in the State to assess and tax the same until at least the fee is conveyed to the Indian. *United States v. Rickert* (188 U. S. 432). Upon issuance of the fee simple patent following expiration of the trust period, however, the title passes from the United States to the allottee. The jurisdiction and authority theretofore possessed by the Secretary of the Interior by reason of the prior trust and restriction come to an end (*Larkin v. Paugh*, 276 U. S. 431), and the allottee becomes invested with full power of alienation and as a necessary incident thereof, the lands become subject to taxation in the same manner as property belonging to other citizens. *Goudy v. Meath* (203 U. S. 146).

* * * *

Under the treaty of 1863, by which the Nez Perce Reservation was created, the United States agreed to reserve the land for a home and the sole use and occupancy of said tribe. So far as here material, the treaty provided that immediately after ratification thereof, the President should cause the boundaries of the reservation to be surveyed and established, after which the cultivable land should be surveyed into lots of 20 acres each and one such lot assigned to each member of the tribe over the age of 21 years, or the head of a family, who desired it "as a permanent home for such person," and set apart for the perpetual and exclusive use and benefit of himself and heirs. Then followed the provision reproduced above with respect to the taxability and alienability of the lands assigned. The residue of the land was to be held in common for pasturage for the sole use and benefit of the Indians, with the provision, however, for future assignments of land from time to time as members of the tribe might come upon the reservation and claim the privileges granted by the treaty. By an amendatory treaty of August 13, 1868, ratified February 24, 1869 (15 Stat. 693), provision was made, among others, for the removal of Indians residing outside the reservation to allotments within the

reservation, or upon certain conditions such Indians might be allowed to remain on the lands then occupied by them upon the same terms and conditions as those within the reservation.

Examination of the records of the Indian Office, however, discloses that no allotments were made to the Indians under the provisions of these earlier treaties, because the Indians, being dissatisfied with the small quantity of land to which each was entitled, had refused to take such allotments. Matters stood thus when the general allotment act of 1887 was passed, section 1 of which provided that in all cases where "any tribe or band of Indians has been or shall hereafter be located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or Executive order setting apart the same for their use," the President is authorized, whenever in his opinion any such reservation or part thereof is advantageous for agricultural or grazing purposes, to cause the same to be surveyed and to allot the lands in severalty to any Indian located thereon in the quantities therein specified. Acting upon authority of this statute, which embraced within its scope reservations created by treaty stipulation, such as the Nez Perce, the President, on April 13, 1889, issued directions for the making of allotments of land in severalty to the Indians of the Nez Perce Reservation under the provisions of the general allotment act. Pursuant thereto, a schedule of allotments, based upon selections made by the Indians, was approved by the Secretary of the Interior on March 19, 1895, and trust patents therefor duly issued to the allottees in conformity with section 5 of the general allotment act, as aforesaid.

In the act of August 15, 1894 (28 Stat. 286, 326, 327, 330), making appropriations for current and contingent expenses of the Indian Department and fulfilling treaty stipulations with the various Indian Tribes, will be found an agreement between the Nez Perce Tribe of Indians and

the United States, from which it appears that in making that agreement the parties proceeded under authority of the act of 1887. By that agreement, the Indians ceded, sold, relinquished and conveyed to the United States all their claim, title and interest in and to certain unallotted lands within the reservation, except certain specified tracts which they retained. The parties stipulated that the lands so ceded should not be open for settlement until "*trust patents for the allotted lands* [italics supplied] had been duly issued and recorded and the first payment made to the Indians. Article 7 stipulated that all allotments made to the members who have died since the same were made, or may die before the ratification of the agreement, shall be confirmed "*and trust patents issued in the names of such allottees respectively.*" [Italics supplied.] Article 2 provided for relinquishments by certain allottees, with provision for the issuance of a new patent "of the form and legal effect prescribed by the fifth section of the act of February 8, 1887 (Twenty-fourth Statutes three hundred and eighty-eight), for the new allotment and that portion of the old allotment surrendered." It is significant to note that the earlier treaties contained no provision for the issuance of trust patents and the stipulations in this later agreement for the issuance of such patents as provided for in the fifth section of the general allotment act, clearly show that it was the understanding of the parties that the provisions of the general allotment act controlled in the matter of allotments, and the agreement can, therefore, have no other effect than to confirm the action of the President in causing the allotments to be made thereunder.

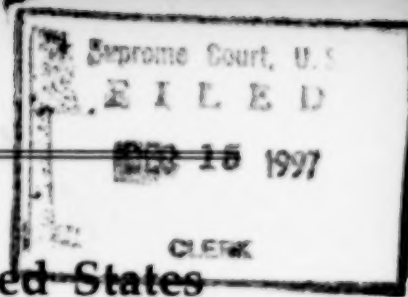
The refusal of the Indians to take allotments under the earlier treaties of 1863 and 1869, the subsequent enactment of the general allotment act of 1887, embracing within its scope reservations such as the Nez Perce, created by treaty stipulation, and the making of allotments thereunder to the Indians with their consent as manifested, not

only by the selections made by them, but by the subsequent agreement of 1894, make it plain that the provisions of the original treaty of 1863 relied upon as creating the tax exemption here claimed, were superseded by the provisions of the general allotment act.

The rights of the Nez Perce Indians with respect to the lands allotted to them, are thus determined by the general allotment act of 1887 and as that act contains no provisions exempting the allotted lands from taxation after issuance of fee simple patents upon expiration of the trust period. I am clearly of the opinion that such lands thereupon become subject to the taxing power of the State.

Approved:

JOS. M. DIXON,
First Assistant Secretary.



In The
Supreme Court of the United States

October Term, 1997

CASS COUNTY, MINNESOTA; SHARON K. ANDERSON, in
her official capacity as Cass County Auditor;
MARGE L. DANIELS, in her official capacity as Cass County
Treasurer; STEVE KUHA, in his official capacity as Cass
County Assessor; JAMES DEMGEN, in his official capacity as
Cass County Commissioner; GLEN WITHAM, in his official
capacity as Cass County Commissioner; ERWIN OSTLUND, in
his official capacity as Cass County Commissioner; VIRGIL
FOSTER, in his official capacity as Cass County Commissioner,

Petitioners;

vs.

LEECH LAKE BAND OF CHIPPEWA INDIANS,

Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The Eighth Circuit

JOINT APPENDIX

Office of Cass County
Attorney

EARL E. MAUS
Cass County Attorney
Counsel of Record
Cass County Courthouse
P.O. Box 3000
Walker, MN 56484
Telephone: (218) 547-7255
Counsel for Petitioners

JAMES M. SCHOESSLER
Counsel of Record
STEVEN G. THORNE
JOSEPH F. HALLORAN
JACOBSON, BUFFALO, SCHOESSLER
& MAGNUSON, LTD.
Suite 810
Lumber Exchange Bldg.
10 South Fifth Street
Minneapolis, MN 55402
Telephone: (612) 339-2071
Counsel for Respondent

Of Counsel:

JAMES W. NEHER
Assistant Attorney General
State of Minnesota

Petition For Certiorari Filed July 8, 1997
Certiorari Granted October 31, 1997

INDEX

	Page
Chronological List of Relevant Docket Entries	1
Plaintiff's Complaint Filed June 6, 1995 .. Pet. App. 51-58*	
Order and Memorandum, Filed December 6, 1995	Pet. App. 30-49
Notice of Appeal, Filed December 22, 1995.....	2
Opinion of Court of Appeals, Filed March 6, 1997	Pet. App. 1-29
Petition for Rehearing with Suggestion for Rehearing En Banc, Filed March 20, 1997	4
Order Denying Petition for Rehearing with Suggestion for Rehearing En Banc, Filed April 9, 1997	Pet. App. 50
The Nelson Act of 1889, 25 Stat. 642.....	Resp. App. A-1-A-8**
The General Allotment Act of 1887, 24 Stat. 388.....	Resp. App. A-9-A-15
The Burke Act of 1906, 34 Stat. 182.....	Resp. App. A-16-A-17
The Homestead Act of 1862, 12 Stat. 392.....	Resp. App. A-18-A-21
1891 Amendments to Homestead Act of 1862, 26 Stat. 1095	Resp. App. A-22-A-36

* "Pet. App. ____" Designates appendix pages to the Petition For A Writ Of Certiorari.

** "Resp. App. ____" designates appendix pages to Respondent's Brief In Opposition To Petition For Writ Of Certiorari.

INDEX - Continued

Nonintercourse Act of 1834, 4 Stat. 730, 25 U.S.C. § 177 (1996).....	13
The legislative history of the 1960 amendment to the Navajo-Hopi Rehabilitation Act of April 19, 1950, reprinted at 1960 United States Code Con- gressional and Administrative News, pp. 2352-2356.....	14

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

June 6, 1995 - Plaintiff's Complaint filed.

December 6, 1995 - Order filed Denying Plaintiff's Motion for Summary judgment and dismissing action.

December 22, 1995 - Plaintiff's Notice of Appeal filed.

March 6, 1997 - Opinion and Judgment of the United States Court of Appeals for the Eighth Circuit.

March 20, 1997 - Petition of Defendants-Appellees for Rehearing with Suggestion for Rehearing En Banc filed.

April 9, 1997 - Order filed Denying Petition for Rehearing with Suggestion for Rehearing En Banc.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

LEECH LAKE BAND OF
CHIPPEWA INDIANS,

Plaintiff,

v.

CASS COUNTY, MINNESOTA
and in their official capacities,
SHARON K. ANDERSON, CASS
COUNTY AUDITOR; MARGE L.
DANIELS, CASS COUNTY
TREASURER; STEVE KUHA,
CASS COUNTY ASSESSOR; and
JOHN STRANNE, JAMES
DEMGEN, GLEN WITHAM,
ERWIN OSTLUND and VIRGIL
FOSTER, CASS COUNTY
COMMISSIONERS,

Defendants.

File No.
5-95 CIV 99

NOTICE OF
APPEAL

(Filed
December 22, 1995)

Notice is hereby given that the Leech Lake Band of Chippewa Indians, Plaintiffs in the above named case, hereby appeals to the United States Court of Appeals for the Eighth Circuit from the final judgment of dismissal entered in this action on the 5th day of December, 1995.

Respectfully submitted,

/s/ James M. Schoessler
James M. Schoessler
Atty. Regis. No. 97433
JACOBSON, BUFFALO,
SCHOESSLER, & MAGNUSON,
LTD.

810 Lumber Exchange Building
10 South Fifth Street
Minneapolis, MN 55402
Telephone: (612) 339-2071
COUNSEL FOR THE
PLAINTIFF/APPELLANT
LEECH LAKE BAND OF
CHIPPEWA INDIANS

Dated: December 19, 1995

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
NO. 95-4263 MND

Leech Lake Band of Chippewa Indians,
Plaintiff-Appellant,

vs.

Cass County, Minnesota and, in their official
capacities, Sharon K. Anderson, Cass County Auditor;
Marge L. Daniels, Cass County Treasurer; and Steve
Kuha, Cass County Assessor; John Stranne, James
Demgen, Glenn Witham, Erwin Ostlund, and Virgil
Foster, Cass County Commissioners,
Defendants-Appellees.

On Appeal From the United States District Court
For the District of Minnesota

PETITION FOR REHEARING WITH
SUGGESTION FOR REHEARING EN BANC

OFFICE OF CASS COUNTY
ATTORNEY

EARL E. MAUS
Cass County Attorney
Atty. Reg. No. 143704
Cass County Courthouse
P.O. Box 3000
Walker, Minnesota 56484
(218) 547-7255
ATTORNEYS FOR
DEFENDANTS-APPELLEES

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

APPEAL NO. 95-4263 MND

District Court/Agency Case Number: 5-95-99

I express a belief, based on a reasoned and studied
professional judgment, that the decision is contrary to the
following decisions of the Supreme Court of the United
States, and that consideration by the full court is neces-
sary to secure and maintain uniformity of decisions in
this court:

County of Yakima v. Yakima Indian Nation,
502 U.S. 251, 112 S. Ct. 683 (1992)
Goudy v. Meath, 203 U.S. 146, 27 S. Ct. 48 (1906)

/s/ Earl E. Maus
Earl E. Maus

I express a belief, based on a reasoned and studied
professional judgment, that this appeal raises the follow-
ing question of exceptional importance:

1. Does the free alienability of tribal land owned in
fee render that land subject to ad valorem taxa-
tion?

/s/ Earl E. Maus
Earl E. Maus

I. PETITION

Pursuant to Rule 35(a) of the Eighth Circuit Rules of
Appellate Procedure and Rule 40 of the Federal Rules of
Appellate Procedure, Defendants-Appellees ("Cass
County") hereby petition this Honorable Court for a

rehearing with suggestion for rehearing en banc on the grounds that, in the opinion of counsel for Cass County, the Eighth Circuit Panel's decision (1) raises issues of exceptional public importance, and (2) is contrary to decisions of the United States Supreme Court.

II. PRELIMINARY STATEMENT

This petition seeks rehearing of the Circuit Panel's decision that the free alienability of tribal land owned in fee does not render that land subject to ad valorem taxation. Cass County submits that the Circuit Panel's decision is contrary to the United States Supreme Court decisions in *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251, 112 S. Ct. 683 (1992) and *Goudy v. Meath*, 203 U.S. 146, 27 S. Ct. 48 (1906).

III. BASIC FACTS

The land parcels in question in this case are owned by Plaintiff-Appellant Leech Lake Band of Chippewa Indians ("the Band") in fee simple. These parcels originally entered the marketplace in two different ways: (1) Allotment by the United States Government to individual Indians under section 3 of the Nelson Act "in conformity with" the General Allotment Act of 1887 ("the GAA"), with subsequent purchases and sales and ultimate reacquisition in fee simple by the Band; and (2) sale by the United States Government under the Pine Land and Homestead provisions of the Nelson Act (sections 4 and 5 and section 6, respectively) with subsequent reacquisition in fee simple by the Band.

The Circuit Panel held that, pursuant to section 6 of the GAA as amended by the Burke Act of 1906, the parcels originally allotted under the Nelson Act in conformity with the GAA, so long as they are patented in fee after passage of the Burke Act, are subject to ad valorem taxation by Cass County. The Panel held, however, that the parcels originally sold under the Pine Land and Homestead provisions of the Nelson Act, notwithstanding that they are freely alienable, are not subject to ad valorem taxation by the County.

IV. THE MAJORITY OPINION HOLDING THAT THE ALIENABILITY OF THE TRIBAL LAND IN THIS CASE DOES NOT RENDER IT SUBJECT TO AD VALOREM TAXATION IS CONTRARY TO THE UNITED STATES SUPREME COURT DECISIONS IN THE YAKIMA AND GOUDY CASES.

A. In Holding That The Tribal Land In The Yakima Case Was Subject To Ad Valorem Taxation, The United States Supreme Court Relied On The Reasoning In The Goudy Decision And Made It Clear That Neither Section 6 Of The GAA Nor The Burke Act Proviso Amending Section 6 Was Necessary To Its Decision.

In *Yakima* the Court stated with respect to the *Goudy* decision:

But (and now we come to the misperception [on the part of the Yakima Nation and its Amicus United States] concerning the structure of the General Allotment Act) *Goudy* did not rest exclusively, or even primarily, on the § 6 grant of personal jurisdiction over allottees to sustain

the land taxes at issue. Instead, it was the *alienability of the allotted lands* – a consequence produced in these cases not by § 6 of the General Allotment Act, but by § 5 – that the Court found of central significance.

502 U.S. at 263, 112 S. Ct. at 690 (emphasis by Court, footnote omitted). And specifically with respect to the Burke Act proviso which permitted the issuance of fee patents to certain allottees prior to expiration of the 25-year trust period prescribed under the GAA, but which did not subject an Indian owner of land to *plenary* state jurisdiction, the Court stated that the fact the proviso freed the land of “all restrictions as to sale, encumbrance or taxation,” merely “*reaffirmed* for such ‘prematurely’ patented land what § 5 of the General Allotment Act implied with respect to patented land generally: subjection to state real estate taxes.” 502 U.S. at 264, 112 S. Ct. at 691 (emphasis added, footnote omitted). As the dissent in this case stated with respect to this language from *Yakima*:

It is clear that the *Yakima County* Court’s analysis of the Burke Act was nothing more than additional support for its holding that alienability resulted in taxability. As the Court stated:

[T]he [Burke Act] proviso *reaffirmed* for such “prematurely” patented land what § 5 of the General Allotment Act implied with respect to patented land generally: subjection to state real estate taxes.

Yakima County, 507 U.S. at 264 (emphasis added). I note that, as a matter of plain logic, a “reaffirmation” supports, rather than controls, a

conclusion. In addition, rather than being limited by the Burke Act’s provision for the taxation of only prematurely patented land, the *Yakima County* Court allowed taxation over all land allotted under the General Allotment Act. *See id.* at 270.

Dissenting Opinion at 20.

As a further clarification of its holding, the *Yakima* Court, apparently in response to an expression of concern by *Amicus Curiae* United States, made it clear that, as to the question of taxability, it mattered not at all whether land was originally patented in fee pursuant to Section 5 of the GAA (after expiration of the 25-year trust period) or pursuant to the Burke Act proviso as “prematurely” patented land. The Court said in no uncertain terms:

Since the [Burke Act] proviso is nothing more than an acknowledgment (and clarification) of the operation of § 5 with respect to all fee-patented land, it is inconsequential that the trial record does not reflect “which (if any) of the parcels owned in fee by the Yakima Nation or individual members originally passed into fee status pursuant to the proviso, rather than at the expiration of the trust periods. . . .” Brief for United States as *Amicus Curiae* 13, n. 10.

County of Yakima, 502 U.S. at 264, 112 S. Ct. at 691, n. 4. In other words, freely alienable land held in fee is subject to ad valorem taxation irrespective of how it was originally patented.

In sum, the *Yakima* Court explained in painstaking detail the reasoning underlying its straightforward holding that:

[W]hen § 5 rendered the allotted lands alienable and encumberable, it also rendered them subject to assessment and forced sale for taxes.

County of Yakima, 502 U.S. at 263-64, 112 S. Ct. at 691. As the dissent recognized, that reasoning did not include reliance on the Burke Act proviso as necessary to the Court's holding of taxability.

B. The Majority Opinion Misinterprets The Reasoning Underlying The Disallowance Of The Excise Tax In The *Yakima* Decision.

As the Majority Opinion in this case points out, the *Yakima* decision, while holding that the GAA authorized Yakima County to impose an ad valorem tax on tribal land, held that it did not authorize imposition of an excise tax on sales of that land. Majority Opinion at 10. The Majority Opinion concluded that:

If alienability always equals taxability, it should be the nature of the property right, not the nature of the tax, that matters. If that were the rule, the Court should have upheld both the ad valorem and the excise taxes levied by the County since the land was made alienable by the GAA.

Id. Cass County submits that this conclusion is incorrect.

Rather than basing its excise tax holding on the nature of the Tribe's ownership interest in the property in question, the *Yakima* Court made it clear that the difference in the *incidence* of the two taxes was the determinative factor leading to the conclusion that the GAA, while authorizing an ad valorem tax on tribal land, did not

authorize an excise tax on *sales* of that land. In construing the language "taxation of land" not to encompass a tax on such sales, the Court said:

To render this [the excise tax] a "taxation of land" in the narrow sense, it does not suffice that, under Washington law, the excise tax creates "a specific lien upon each piece of real property sold from the time of sale until the tax shall have been paid. . . ." Wash. Rev. Code § 82.45.070 (1989). A lien upon real estate to satisfy a tax does not convert the tax into a tax upon real estate. . . .

The short of the matter is that the General Allotment Act explicitly authorizes only "taxation of . . . land," not "taxation with respect to land," "taxation of transactions involving land," or "taxation based on the value of land." Because it is eminently reasonable to interpret that language as not including a tax upon the sale of real estate, our cases require us to apply that interpretation for the benefit of the Tribe. Accordingly, Yakima County's excise tax on sales of land cannot be sustained.

County of Yakima, 502 U.S. at 269-70, 112 S. Ct. at 693-94.

Thus, it is clear that the *Yakima* Court did not draw a distinction between the ad valorem tax and the excise tax based on the nature of the Tribe's ownership interest in the real estate. It drew a distinction between them based on the conclusion that the GAA authorized only a tax whose incidence is on the land itself, not a tax whose incidence is on "transactions involving land." *Id.* For this reason, the *Yakima* Court's holding that the excise tax is unenforceable as outside the purview of the GAA is

separate and apart from its holding on the ad valorem tax issue, and in no way implies that the Court would have upheld the excise tax if Cass County's reading of *Yakima* were correct.

CONCLUSION

The Majority Opinion in this case, in holding that the Supreme Court in *County of Yakima* found the Burke Act proviso necessary to its decision, misapprehends the thrust of that decision. *Yakima*, in upholding imposition of the ad valorem tax, clearly based its ruling not on the proviso but on the free alienability of the land in question. For that reason, the Majority Opinion is not in accord with the holding in *Yakima*, and rehearing by the Court *en banc*, as suggested by Petitioner Cass County, is warranted.

Dated: March 20, 1997 Respectfully submitted,
 OFFICE OF CASS COUNTY
 ATTORNEY
 /s/ Earl E. Maus
 EARL E. MAUS
 Cass County Attorney
 Atty. Reg. No. 143704
 Cass County Courthouse
 P.O. Box 3000
 Walker, Minnesota 56484
 (218) 547-7255
 ATTORNEYS FOR
 DEFENDANTS-
 APPELLEES

Nonintercourse Act of 1834, 4 Stat. 730, 29 U.S.C. § 177 (1996)

§ 177. Purchases or grants of lands from Indians

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian Nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of \$1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

LEGISLATIVE HISTORY

INDIAN WELFARE - NAVAJO AND HOPI TRIBES

For text of Act see p. 227

Senate Report No. 1123, Feb. 23, 1960
[To accompany S. 2456]

House Report No. 1648, May 24, 1960
[To accompany S. 2456]

The House Report is set out.

House Report No. 1648

THE Committee on Interior and Insular Affairs, to whom was referred the bill (S. 2456) to amend the act of April 19, 1950 (64 Stat. 44; 25 U.S.C. 635), to better promote the rehabilitation of the Navajo and Hopi Tribes of Indians, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE OF THE BILL

The purpose of S. 2456 is twofold. First, it amends the Navajo-Hopi Rehabilitation Act of April 19, 1950 (64 Stat. 44; 25 U.S.C. 633), to permit the Navajos to dispose of fee lands owned by the tribe without Federal supervision and to provide for transfer of tribal lands to tribally owned or municipal corporations. Second, the bill amends the act of August 9, 1955 (69 Stat. 539), as amended, to allow 99-year leases of Navajo Indian land to be made. Two bills, H.R. 9382 and H.R. 11627, introduced by Representative Udall, were considered by the Committee on Interior and Insular Affairs with S. 2456.

NEED FOR THE BILL

The Navajo Tribe has acquired in recent years with its own funds approximately 100,000 acres in fee simple. Under the provisions of Revised Statutes 2116 (25 U.S.C. 177), it appears that no one can safely acquire these lands by purchase or otherwise without the consent of the United States. *Tuscarora Indian Nation v. Federal Power Commission*, 265 F.2d 338 (C.A., D.C. 1958); *Tuscarora Nation v. Power Authority of the State of New York*, 257 F.2d 885 (C.A.2, 1958). This, of course, operates as a limitation on the power of the tribe to dispose of them as it sees fit. The committee believes that this disability should be removed in the case of the Navajo Tribe and that it should be free to manage its free [sic] simple lands as it wishes.

A further amendment to section 5 of the Navajo-Hopi Act of 1950 will authorize the Secretary of the Interior, upon request of the Navajo Tribal Council, to transfer to any corporation owned by the tribe and organized pursuant to State laws, or to any municipal corporation organized under State law, legal title to or a leasehold interest in unallotted lands held by the Navajo Indian Tribe. Upon such transfer the United States would relinquish responsibility for the lands but, if so requested by the tribe, the Secretary of the Interior would render advice and assistance in their management. The enactment of this provision will assist the tribe in creating municipal organizations within the reservation and in setting up such enterprises as a tribal housing authority which would manager the realty turned over to it by the tribe.

Each of these amendments is recommended in recognition of the Navajos' ability and willingness to assume greater responsibilities in the management of their affairs.

Section 2 amends the Indian Leasing Act of 1955 to permit 99-year leasing on the Navajo Reservation. The need for longer term leasing authority than is now available stems from the need for financing improvements through bank and insurance company loans. A 50-year lease – the longest that can now be entered into – usually has less than 50 years to run by the time the lessee concludes his negotiations for a loan. Thus the lessee is prevented from obtaining a loan from a national bank or on the basis of a federally insured loan because the statutes preclude loans secured by the mortgage of a leasehold estate if the lease does not, at the time of the loan, have at least 50 years to run (12 U.S.C. 371, 1707, 1713).

There is prospect for the establishment of several enterprises, including a \$7 million sawmill, a \$150 million powerplant, byproduct industries, and a home-construction project, on the reservation of satisfactory leasing arrangements can be made.

The committee was assured that the extension to the Navajo Tribe of permissible 99-year leasing does not mean that all leases will be granted for the maximum term and that the Secretary of the Interior will not approve leases for terms that are longer than needed to obtain the best results for the Indian owner and to finance optimum economic development.

COST

The enactment of S. 2456 will entail no expenditure of Federal funds.

DEPARTMENTAL REPORT

The favorable reports of the Secretary of the Interior and the Bureau of the Budget, dated September 1, 1959, and August 24, 1959, respectively, are as follows:

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., September 1, 1959.

HON. JAMES E. MURRAY,
Chairman, Committee on Interior and Insular Affairs,
U.S. Senate, Washington, D.C.

DEAR SENATOR MURRAY: Your committee has requested a report on S. 2456, a bill to amend the act of April 19, 1950 (64 Stat. 44; 25 U.S.C. 635), to better promote the rehabilitation of the Navajo and Hopi Tribes of Indians.

The bill deals with a number of different subjects and we shall discuss them separately.

1. Section 5 of the Navajo-Hopi Rehabilitation Act authorizes 25-year leases, with an option to renew for one additional term of 25 years, for five specified purposes which are public, religious, educational, recreational, and business. The bill makes two changes:

(a) It adds "residential" to the list of purposes for which leases may be made.

(b) It permits leases of Navajo tribal land to be for a term of not to exceed 99 years, rather than for a term of not to exceed 25 years with one 25-year renewal.

We have no objection to the first change, but it is unnecessary because the same authority is already granted by the general long-term leasing act of August 9, 1955 (69 Stat. 539). This change in the Navajo-Hopi Rehabilitation Act would grant no new authority and would serve no useful purpose.

The authority for 99-year leases is desirable. The need for longer term lease authority is due to the difficulty in financing improvements through bank and insurance company loans on the basis of a 50-year lease. A 50-year lease normally has less than 50 years to run at the time the loan is negotiated by the lessee. This prevents the lessee from getting a loan from a national bank or a federally insured loan because the applicable statutes preclude loans secured by the mortgage of a leasehold estate unless the lease has not less than 50 years to run (12 U.S.C. 371, 1707, 1713). If long-term lease authority is to be used effectively, it must be for a term that is long enough to permit the financing of maximum economic development.

The committee's consideration is directed to the following consideration. A bill authorizing the equivalent of 75-year leases on the Palm Springs Reservation is now pending before Congress (H.R. 6672). It is in the form of an amendment to the general long-term leasing act of August 9, 1956. In order to keep our long-term leasing authority in one place, and in order to simplify regulations, we suggest that the 99-year lease authority for Navajo lands should also be in the form of an amendment to the general long-term leasing act, rather than an amendment to the Navajo-Hopi Rehabilitation Act. If that

is done, it would be unnecessary to amend the leasing provision in the Navajo-Hopi Rehabilitation Act at all.

2. The bill provides that land owned by the Navajo Tribe in fee simple may be leased or sold by the tribe without the approval of any Federal agency.

The provision is a desirable one. The problem arises because the provisions of Revised Statutes 2116 (25 U.S.C. 177) have recently been construed by the courts to apply to lands owned by a tribe in fee simple (*Tuscarora Indian Nation v. Federal Power Commission*, 265 F.2d 338 (C.A., D.C. 1958), and *Tuscarora Nation v. Power authority of the State of New York*, 257 F.2d 886 (C.A.2, 1958)). Revised Statutes 2116 prohibits a sale or lease of land by an Indian tribe except by treaty or convention entered into pursuant to the Constitution. Congress has provided by subsequent legislation for tribal leases, but not for sales of tribal land.

Our records show that the Navajo Tribe has acquired a fee-simple title to approximately 99,100 acres of land, as distinguished from a title that is held by the United States in trust or a title that is held by a tribe subject to a restriction against alienation specifically imposed by the United States. We believe that the title should be unrestricted. Prior to the *Tuscarora* decisions, the assumption was that such lands were unrestricted and were not subject to Federal control. Inasmuch as we have had no control over some of these purchases, the foregoing acreage figure may be incomplete.

3. The bill authorizes the Secretary to transfer to any corporation owned by the Navajo Tribe and organized under State law, or to a municipal corporation

organized under State law, any tribal land whenever the Navajo Tribal Council requests the transfer. Thereafter the United States will have no trust responsibility for the land.

We do not know of any immediate desire on the part of the tribe to use this authority, but the grant of the authority would be a step in the right direction. The authority could be used only on request of the tribe, and even then the Secretary would be permitted to exercise his discretion in determining whether a transfer requested by the tribe would be in its best interest.

4. In summary, we recommend that -

(a) The 99-year lease authority should be recast in the form of an amendment to the general long-term leasing act of 1955.

(b) The authority to sell tribal land owned by the Navajo Tribe in fee simple without secretarial supervision should be enacted.

(c) The authority to transfer Navajo tribal property to a State corporation or municipal corporation controlled by the tribe should be enacted.

The amendments to accomplish these results are as follows:

1. On page 1, line 3, through page 2, line 19, delete the present language and insert in lieu thereof the following:

"That the second sentence of section 1 of the Act of August 9, 1955 (69 Stat. 539), is amended to read as follows: 'All leases so granted shall be for a term of not to

exceed twenty-five years, except leases of land on the Navajo Reservation and on the Agua Caliente (Palm Springs) Reservation which may be for a term of not to exceed ninety-nine years, and except leases of land for grazing purposes which may be for a term of not to exceed ten years'."

2. On page 2, after line 19, insert:

"Sec. 2. Section 5 of the Act of April 19, 1950 (25 U.S.C. 635), is amended by inserting '(a)' before the present text and by adding the following subsections (b) and (c):"

The Bureau of the Budget has advised us that there is no objection to the submission of this report.

Sincerely yours,

ROGER ERNST,
Assistant Secretary of the Interior.

EXECUTIVE OFFICE OF THE PRESIDENT,
BUREAU OF THE BUDGET,
WASHINGTON, D.C., AUGUST 24, 1959.

HON. JAMES E. MURRAY,
*Chairman, Committee on Interior and Insular Affairs,
New Senate Office Building, Washington, D.C.*

MY DEAR MR. CHAIRMAN: This is in response to your requests for the views of the Bureau of the Budget on S. 2456, a bill to amend the act of April 19, 1950 (64 Stat. 44; 25 U.S.C. 635), to better promote the rehabilitation of the Navaho [sic] and Hopi Tribes of Indians.

The purpose of the bill is to revise section 5 of the act cited in the title so as to authorize 99-year leases of the Navaho [sic] tribal land, and to include "residential" in

the list of purposes for which leases may be made. The bill also provides that lands held in fee simple by the Navaho [sic] Tribe may be sold or leased by the tribe without restriction. And that the Secretary of the Interior may transfer any trust lands held for the Navahos [sic] to a tribal or municipal corporation upon request of the tribal counsel. All trust responsibility for such land would thereupon be terminated.

The Department of the Interior suggests that the provision of S. 2456 which would authorize leases up to 99 years for the Navaho [sic] tribal lands be recast in the form of an amendment to the act of August 9, 1956. The Department also notes that the addition of "residential" to the list of authorized purposes for which leases may be made is unnecessary since it is already covered by existing legislation.

The Bureau of the Budget would have no objection to enactment of S. 2455 if amended as recommended by the Department of the Interior.

Sincerely yours,

PHILLIP S. HUGHES,
Assistant Director for Legislative Reference.

COMMITTEE RECOMMENDATION

The Committee on Interior and Insular Affairs recommends enactment of S. 2456.

DEC 15 1997

CLERK

In The
Supreme Court of the United States

October Term, 1997

CASS COUNTY, MINNESOTA; SHARON K.
ANDERSON, in her official capacity as Cass County
Auditor; MARGE L. DANIELS, in her official capacity
as Cass County Treasurer; STEVE KUHA, in his
official capacity as Cass County Assessor; JAMES
DEMGEN, in his official capacity as Cass County
Commissioner; GLEN WITHAM, in his official capacity
as Cass County Commissioner; ERWIN OSTLUND, in
his official capacity as Cass County Commissioner;
VIRGIL FOSTER, in his official capacity as
Cass County Commissioner,

Petitioners,

vs.

LEECH LAKE BAND OF CHIPPEWA INDIANS,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF FOR THE PETITIONERS

Office of Cass County
Attorney

EARL E. MAUS
Cass County Attorney
Counsel of Record
Cass County Courthouse
P.O. Box 3000
Walker, MN 56484
Telephone: (218) 547-7255
Counsel for Petitioners

Of Counsel:

MARK B. LEVINGER
JAMES W. NEHER
Assistant Attorneys General
State of Minnesota

32/92

QUESTION PRESENTED

Under the decisions of this Court in *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251 (1992), and *Goudy v. Meath*, 203 U.S. 146 (1906), is alienable land patented in fee by the federal government, and subsequently reacquired in fee by an Indian band, subject to state and local government taxation if it remains freely alienable, irrespective of the statute or treaty under which it was originally conveyed?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
OPINIONS BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	1
STATEMENT OF THE CASE.....	2
SUMMARY OF ARGUMENT.....	9
ARGUMENT	11
LAND PATENTED IN FEE BY THE FEDERAL GOVERNMENT AND SUBSEQUENTLY REACQUIRED IN FEE BY AN INDIAN TRIBE IS SUBJECT TO STATE AND LOCAL TAXATION IF IT REMAINS FREELY ALIENABLE, IRRESPECTIVE OF THE STATUTE OR TREATY UNDER WHICH IT WAS ORIGINALLY CONVEYED.....	11
A. The <i>Yakima</i> Decision Upholding The Taxability Of Land Owned In Fee By The Yakima Nation Or Its Members Was Grounded On The Alienability Of The Land In Question.....	11
B. In Holding That The Pine Lands And Homestead Parcels Are Exempt From Property Taxation, The Court Of Appeals Misread Both The <i>Yakima</i> And <i>Goudy</i> Decisions	16
1. The court of appeals erroneously concluded that this Court based its validation of the property tax in <i>Yakima</i> on the Burke Act amendment to section 6 of the GAA (the Burke Act proviso).....	17

TABLE OF CONTENTS – Continued

	Page
2. The fact that the <i>Yakima</i> decision struck down the excise tax imposed on sales of land does not support the court of appeals decision in this case.....	19
3. The remand in <i>Yakima</i> does not support the court of appeals decision in this case.....	21
4. The absence of explicit language in the Nelson Act authorizing taxation of the pine lands and homestead parcels does not indicate an intent on the part of Congress to exempt those parcels from taxation.....	23
5. The court of appeals decision in this case would produce both serious administrative problems for property tax assessors and inequitable results in the classification for tax purposes of Indian-owned lands	24
CONCLUSION	26

TABLE OF AUTHORITIES

Page

CASES:

<i>California v. Federal Energy Regulatory Commission</i> , 495 U.S. 490 (1990), <i>reh. denied</i> , 497 U.S. 1040 (1990)	16
<i>Goudy v. Meath</i> , 203 U.S. 146 (1906)	<i>passim</i>
<i>In re Heff</i> , 197 U.S. 488 (1905)	3
<i>Lummi Indian Tribe v. Whatcom County, Washington</i> , 5 F.3d 1355 (9th Cir. 1993), <i>cert. denied</i> , 114 S. Ct. 2727 (1994)	18, 24
<i>Montana v. Blackfeet Tribe</i> , 471 U.S. 759 (1985)	12
<i>Patterson v. McLean Credit Union</i> , 491 U.S. 164 (1989)	16
<i>Saginaw Chippewa Indian Tribe v. State of Michigan</i> , 106 F.3d 130 (6th Cir. 1997)	19, 21
<i>County of Yakima v. Yakima Indian Nation</i> , 502 U.S. 251 (1992)	<i>passim</i>

STATUTES

The Burke Act of 1906, 34 Stat. 182	<i>passim</i>
The General Allotment Act of 1887, ch. 119, 24 Stat. 388	<i>passim</i>
The Homestead Act of 1862, 12 Stat. 392, as amended by the Act of 1891, 26 Stat. 1095	1, 2, 5, 6, 8, 11
The Indian Reorganization Act, 48 Stat. 984, 25 U.S.C. § 461 <i>et seq.</i> (1996)	4, 8, 14
The Nelson Act of 1889, ch. 24, 25 Stat. 642	<i>passim</i>
25 U.S.C. § 177 (1996)	5
25 U.S.C. § 320 (1996)	22

TABLE OF AUTHORITIES - Continued

Page

25 U.S.C. § 348 (1996); 24 Stat. 388, § 5	3
25 U.S.C. § 349; 24 Stat. 388, § 6	3
25 U.S.C. § 379 (1996)	22
25 U.S.C. § 404 (1996)	22
25 U.S.C. § 405 (1996)	22
28 U.S.C. § 1254(1) (1996)	1
28 U.S.C. § 1331 (1996)	5
28 U.S.C. § 1362 (1996)	5
28 U.S.C. § 2201 (1996)	5
28 U.S.C. § 2202 (1996)	5
42 U.S.C. § 1983 (1996)	5

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-29)¹ is reported at 108 F.3d 820. The opinion of the district court (Pet. App. 30-49) is reported at 908 F. Supp. 689.

JURISDICTION

The court of appeals entered its judgment on March 6, 1997, and Petitioners' petition for rehearing was denied by order dated April 9, 1997. The petition for a writ of certiorari was filed on July 8, 1997, and was granted on October 31, 1997. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1) (1996).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Nelson Act of 1889, 25 Stat. 642, §§ 3, 4, 5 and 6 (Resp. App. A-1-A-8);² the General Allotment Act of 1887, 24 Stat. 388, §§ 5 and 6 (Resp. App. A-9-A-15); the Burke Act of 1906, 34 Stat. 182 (Resp. App. A-16-A-17); the Homestead Act of 1862, 12 Stat. 392, as amended by the Act of 1891, 26 Stat. 1095 (Resp. App. A18-A-36).

¹ "Pet. App. ____" designates appendix pages to the Petition for a Writ of Certiorari.

² "Resp. App. ____" designates appendix pages to Respondent's Brief in Opposition to Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Respondent Leech Lake Band of Chippewa Indians ("the Band") is a federally recognized Indian tribe, with its Reservation in Cass County, Minnesota, having been established in accordance with the treaty of February 22, 1855, 10 Stat. 1165. Pet. App. 53.

In the late 19th century the federal government instituted a policy of allotting lands to individual Indians. The objectives of this policy were: "to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large." *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251, 254 (1992).

In accordance with this federal policy, Congress, in 1889, passed the Nelson Act. Act of January 14, 1889, ch. 24, 25 Stat. 642. Under the Nelson Act the United States conveyed land located in Leech Lake and other Chippewa Indian reservations in Minnesota to Indians and non-Indians in three separate ways: (1) allotments to individual Indians pursuant to section 3 of the Nelson Act "in conformity with" the General Allotment Act of 1887 ("the GAA"), ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. § 331 *et seq.* (1996)); (2) sales to non-Indians under the "pine land" sale provisions of sections 4 and 5 of the Nelson Act; and (3) conveyances to non-Indians pursuant to the Homestead Act, as authorized under section 6 of the Nelson Act.

Under the GAA (the allotment provisions of which were incorporated into the Nelson Act) the United States government was authorized to allot, and ultimately patent in fee, lands to individual Indians. Section 5 of the GAA provided that the allotted lands were subject to a

twenty-five-year trust period ("the trust period") and that those lands would be patented in fee to the allottees, becoming freely alienable by them, upon expiration of the trust period.³ Section 6 of the GAA provided, *inter alia*, that the GAA allottees, upon patenting of their lands to them, would become subject to the civil and criminal jurisdiction of the state or territory in which they resided,⁴ thereby furthering the goal of assimilation. See *Yakima*, 502 U.S. at 254.

In *In re Heff*, 197 U.S. 488 (1905), this Court held that section 6 of the GAA subjected allottees to plenary state

³ Section 5 of the GAA provided in part:

[A]t the expiration of said [trust] period the United States will convey [the allotted lands] by patent to said Indian . . . in fee, discharged of said trust and free of all charge or encumbrance whatsoever. . . . And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same before the expiration of the [trust period], such conveyance or contract shall absolutely be null and void. . . .

25 U.S.C. § 348 (1996); 24 Stat. 388, § 5; Pet. App. 59.

⁴ Section 6 of the GAA, prior to the 1906 amendment, provided with respect to jurisdiction over the allottees:

That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law.

25 U.S.C. § 349; 24 Stat. 388, § 6; Pet. App. 59.

jurisdiction prior to expiration of the trust period provided under section 5. In reaction to that decision, Congress enacted the Burke Act amendment to section 6, which provided that the allottees would not become subject to state civil and criminal jurisdiction until expiration of the trust period. See *Yakima*, 502 U.S. at 264. The Burke Act also contained a proviso permitting the Secretary of the Interior, under certain circumstances, to issue fee patents prior to expiration of the section 5 trust period.⁵

Finally, in 1934, with the enactment of the Indian Reorganization Act, 48 Stat. 984, 25 U.S.C. § 461 *et seq.* (1996), the federal government's allotment program and policy of assimilation came to an end, and Congress returned to "the principles of tribal self-determination and self-governance." *Yakima*, 502 U.S. at 255.

Beginning with the year 1993, following this Court's decision in *Yakima*, Petitioners⁶ ("Cass County" or "the County") assessed property taxes against certain land parcels owned in fee by the Band, which had been purchased from private owners. Pet. App. 55. The Band paid

⁵ The Burke Act proviso provided:

That the Secretary of the Interior may in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, encumbrance, or taxation of said land shall be removed.

25 U.S.C. § 349 (1996).

⁶ The Petitioners include Cass County, Minnesota, and eight county officials.

the assessed taxes under protest (Pet. App. 55) and then brought this action for declaratory, injunctive, and monetary relief against the County in the United States District Court for the District of Minnesota. The jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331, 1362, 2201 and 2202; 25 U.S.C. § 177; and 42 U.S.C. § 1983. Pet. App. 52.

The issue in the district court case was whether the land parcels in question, which were originally patented in fee by the federal government under the Nelson Act and subsequently reacquired in fee by the Band, are subject to ad valorem taxation by the County. The parcels were patented under the three provisions of the Nelson Act described above: (1) allotted to individual Indians pursuant to section 3 of the Nelson Act "in conformity with" the GAA (thirteen parcels) (Pet. App. 61); (2) sold to non-Indians as pine lands pursuant to sections 4 and 5 of the Nelson Act (seven parcels) (Pet. App. 62); and (3) conveyed to non-Indians pursuant to the Homestead Act⁷ under the authority found in section 6 of the Nelson Act (one parcel) (Pet. App. 62-3).

The case was heard by the district court on the Band's motion for summary judgment. The court determined that the matter was ripe for summary judgment and granted judgment to defendants, holding that all twenty-one parcels at issue were subject to taxation by Cass County, Pet. App. 31, 49. In arriving at its decision, the court relied on the decision of this Court in *Yakima*

⁷ The Homestead Act of 1862 (12 Stat. 352), as amended by the Act of 1891 (26 Stat. 1095).

which held that lands originally allotted to individual Indians under the GAA and subsequently reacquired in fee by the Yakima Nation or its members, are subject to taxation by Yakima County, Washington. Pet. App. 37-38. In holding that all of the parcels at issue are subject to taxation, the district court determined that *Yakima* stands for the proposition that alienable lands originally patented in fee by the federal government, which have subsequently been reacquired by an Indian tribe or its members, remain freely alienable and therefore subject to ad valorem taxation. Pet. App. 46. Specifically, the district court relied on *Yakima* for its determination that Congress signaled its consent to taxation of the allotted lands through section 5 of the GAA which rendered the allotted lands alienable and encumberable following expiration of the trust period. Pet. App. 36-37.

The court of appeals, in a two-to-one majority decision, affirmed in part and reversed in part the decision of the district court. The majority decision held that the thirteen parcels allotted under section 3 of the Nelson Act, which incorporated the allotment provisions of the GAA, were subject to taxation to the extent they had been patented in fee after enactment of the Burke Act; but that the seven parcels originally sold as pine lands (sections 4 and 5 of the Nelson Act) and the single parcel sold under the Homestead Act (as authorized by section 6 of the Nelson Act) were exempt from taxation. Pet. App. 22-23. The court set out three interrelated bases for its decision.

First, citing *Yakima*, 502 U.S. at 258, the majority stated that Cass County's position that the pine lands and homestead parcels are subject to taxation is incorrect because, in adopting an "alienability equals taxability"

analysis, it fails to give due consideration to the rule established by Supreme Court precedent that Congress must provide its "unmistakably clear intent" to allow state taxation of Indians or their property. Pet. App. 12. The majority stated that the error in the County's position was the result of its reading of *Yakima* as relying on section 5 of the GAA which rendered the allotted lands alienable upon patenting in fee, rather than on the Burke Act proviso in section 6 which, in the words of the court, was referred to repeatedly by this Court in *Yakima* "as the primary source of clear congressional intent to allow the ad valorem tax levied by Yakima County." Pet. App. 12-13. Thus, the court of appeals held that *Yakima* is properly read as having based its holding of taxability on the Burke Act proviso which, in the view of the court, permits taxation only of lands originally patented under the allotment provisions of the GAA after passage of the Burke Act. The court reasoned further that the pine land and homestead parcels, because they were not allotted under section 3 of the Nelson Act "in conformity with" the allotment provisions of the GAA, and the provisions of the Nelson Act authorizing their distribution did not include any mention of an intent to authorize their taxation, are not subject to ad valorem taxation. Pet. App. 22-23.

Second, the court of appeals stated that the County's interpretation of *Yakima* disregards the Court's conclusion in that case that "the § 6 Burke Act proviso authorized the ad valorem tax, but not the excise tax levied [on sales of reservation land] by Yakima County." Pet. App. 13. The court considered that distinction significant because, in its view, if the *Yakima* Court had considered alienability to

mandate taxability, it would have sustained the excise tax as well as the ad valorem tax. *Id.* Therefore, the court reasoned, since the *Yakima* Court determined that the Burke Act proviso authorized assessment of the ad valorem, but not the excise tax, the proviso must be a prerequisite to assessment of the ad valorem tax. *Id.* The majority then concluded that, since the proviso does not apply to the pine land and homestead parcels which were patented in fee pursuant to laws other than allotment under the Nelson Act "in conformity with" the allotment provisions of the GAA, those parcels must be exempt from ad valorem taxation. *Id.*

Finally, the court of appeals noted that the *Yakima* Court, after holding that the land in question was taxable under the GAA, remanded the case based on the Yakima Nation's assertion that it was "not clear whether the parcels at issue . . . were patented under the General Allotment Act, rather than under some other statutes in force prior to the Indian Reorganization Act." *Id.* at 14 n.7 (quoting *Yakima*, 502 U.S. at 270). The court concluded that the remand was an indication that the *Yakima* decision did not equate alienability with taxability, because if that were the case "it should not have mattered under which act the land was made alienable – the mere fact of alienability should have been enough to allow state taxation." *Id.* at 14.

In contrast to the majority decision, the dissent would have held that all of the land parcels in issue – those conveyed to non-Indians under the pine lands and Homestead Act provisions as well as those allotted to individual Indians "in conformity with" the allotment

provisions of the GAA – are subject to ad valorem taxation. *Id.* at 29. The dissent viewed the *Yakima* decision as grounded on the alienability provisions of section 5 of the GAA, with the Burke Act proviso in section 6 as merely "reaffirming" section 5's grant of authority by Congress to tax "all land allotted under the General Allotment Act." *Id.* at 27 n.15.

Following denial of its Petition for Rehearing with Suggestion for Rehearing En Banc, the County filed a petition for a writ of certiorari seeking review of the Eighth Circuit's ruling that the *Yakima* decision in favor of taxability is limited to land allotted under the Nelson Act in conformity with the allotment provisions of the GAA. The Court granted the petition on October 31, 1997. 118 S. Ct. 361.

SUMMARY OF ARGUMENT

This Court's decision in *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251 (1992), held that land originally patented in fee pursuant to the GAA and subsequently required in fee by the Yakima Indian Nation or its members is subject to county ad valorem taxation. 502 U.S. at 256, 270. The court of appeals erroneously held that the *Yakima* decision rested not on the alienability of the land but on the Burke Act amendment to section 6 of the GAA, which authorized the President, under certain circumstances, to issue fee patents prior to expiration of the trust period set out in section 5. The language in the proviso which the court found significant provided that upon such "premature" patenting "all restrictions as to

sale, encumbrance, or taxation of said land shall be removed." 34 Stat. 138. Pet. App. 17-18. The court of appeals decision is incorrect because it misread the *Yakima* opinion to have found the Burke Act proviso necessary to its decision upholding taxation of the land in question.

Contrary to the court of appeals' reading of *Yakima*, this Court made it clear in that case that the bases for its holding of taxability were (1) section 5 of the GAA which rendered the allotted land "alienable and encumberable" upon expiration of the twenty-five-year trust period; and (2) its previous decision in *Goudy v. Meath*, 203 U.S. 146 (1906), which based its holding of taxability on the alienability of land patented to an individual Indian under the GAA. *Yakima*, 502 U.S. at 263.

The court below, in determining that the express language of the Burke Act proviso was necessary to the holding of taxability in *Yakima*, emphasized the well-established rule that state taxation of Indians or their property is permissible only with Congress' unmistakably clear intent to authorize such taxation. Pet. App. 12. In emphasizing that rule, the court incorrectly stated that the *Yakima* decision "repeatedly pointed to the Burke Act proviso in § 6 as the primary source of clear congressional intent to allow the ad valorem tax levied by Yakima County." *Id.* at 12-13. To the contrary, as this Court stated in both *Yakima* and *Goudy*, the release of restrictions on alienability, absent an express exemption, is a sufficiently clear expression of Congress' consent to tax. 502 U.S. at 263; 203 U.S. at 149.

To summarize, the court of appeals erroneously held that *Yakima* stands for the proposition that county taxation of tribally owned land is limited to land allotted under the GAA after enactment of the Burke Act. Pet. App. 22-23. For this reason, the court incorrectly ruled in this case that the parcels patented under laws other than the GAA as adopted by the Nelson Act (the Homestead Act and as "pine lands" pursuant to the Nelson Act) are exempt from taxation by Cass County.

ARGUMENT

LAND PATENTED IN FEE BY THE FEDERAL GOVERNMENT AND SUBSEQUENTLY REACQUIRED IN FEE BY AN INDIAN TRIBE IS SUBJECT TO STATE AND LOCAL TAXATION IF IT REMAINS FREELY ALIENABLE, IRRESPECTIVE OF THE STATUTE OR TREATY UNDER WHICH IT WAS ORIGINALLY CONVEYED.

A. The *Yakima* Decision Upholding The Taxability Of Land Owned In Fee By The Yakima Nation Or Its Members Was Grounded On The Alienability Of The Land In Question.

The issue in this case is whether Congress, by patenting lands in fee and rendering them freely alienable, gave its implicit permission to tax those lands notwithstanding the absence of express statutory language to that effect. Cass County's position is that land patented in fee and made alienable by Congress is subject to taxation in the absence of a clear statement by Congress to the contrary. That is the rule applied in *Goudy v. Meath*, 203 U.S. 146 (1906), and *County of Yakima v. Yakima Indian Nation*, 502

U.S. 251 (1992), and it should be reaffirmed and applied in this case.

The decisions of this Court "reveal a consistent practice of declining to find that Congress has authorized state taxation" unless it has "made its intention to do so unmistakably clear." *Id.* at 258 (quoting from *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985)). This prerequisite to state taxation serves the purpose of preserving both the federal government's exclusive authority over relations with Indian tribes and the general exemption from state taxation of Indian tribes and individuals within their own territory. See *Montana v. Blackfeet Tribe*, 471 U.S. at 764. Cass County's position in this case – that Congress, by making land freely alienable, evinces an unmistakably clear intention to permit its taxation unless its exemption is clearly manifested – furthers the purpose of the rule, and is supported by long-standing Supreme Court case law.

In *Goudy v. Meath*, 203 U.S. 146 (1906), the issue was whether land which had become voluntarily alienable, then automatically became subject to taxation and involuntary alienation. *Id.* at 149, James Goudy was an individual member of the Puyallup Tribe located in the State of Washington. The federal government allotted land to Goudy in January 1886, under the authority of an 1854 treaty. *Id.* at 146-47. That treaty provided that land allotted thereunder would remain exempt from "levy, sale, or forfeiture" until such exemptions were removed by the state's legislature with the consent of Congress. *Id.* at 149. In 1889 the Washington State Legislature declared Goudy and similarly situated Indians to have "power to lease, encumber, grant, and alien the same . . . as any other

person may do. . . ." *Id.* at 147. In 1893 Congress approved the alienation of the allotted lands, after a period of ten years. *Id.*

After the ten-year period had passed, Goudy contended that his land, though now freely alienable by him, was "not subject to taxation or forced sale" until he actually conveyed the land to another person. *Id.* at 148-49. Goudy's contention was based on the fact that there was no express repeal of the exemption from "levy, sale, or forfeiture" contained in the treaty under which he took his allotment. *Id.* at 149. This Court acknowledged that Congress could "grant the power of voluntary sale while withholding the land from taxation or forced alienation," but that if Congress intended to do so that intention "should be clearly manifested." *Id.* at 149. The Court stated that the purpose of the restriction on alienation at that time (during the allotment period) was the "protection of the Indian from the cunning and rapacity of his white neighbors, and it would seem strange to withdraw this protection and permit the Indian to dispose of his lands as he pleases, while at the same time releasing it from taxation, – in other words, that the officers of a state enforcing its laws cannot be trusted to do justice, although each and every individual acting for himself may be so trusted." *Id.* at 149. Thus, the Court established the rule that freely alienable real property, absent a "clearly manifested" exemption, is subject to taxation. *Id.*

This Court reaffirmed *Goudy* in *Yakima*. The issue in *Yakima* was whether land patented in fee to individual Indians under the GAA, and subsequently reacquired in fee by the Yakima Nation or its members, was subject to taxation by the State of Washington. 502 U.S. at 253. The

Yakima Nation and its amicus United States argued that the termination of the allotment program with the enactment of the Indian Reorganization Act in 1934 operated to make the jurisdictional provisions of section 6 of the GAA (granting the State personal jurisdiction over the GAA allottees following expiration of the trust period) a "dead letter." *Id.* at 259-60. This meant, contended the Tribe and the United States, that lands owned by the Tribe or its members were not subject to taxation by the state. *Id.*

The Court, in reaffirming its holding in *Goudy* that voluntarily alienable land is subject to taxation and involuntary alienation unless explicitly exempt, described this argument focusing on section 6 of the GAA as "a misperception of the structure of the General Allotment Act." *Id.* at 263-64. The Court said with respect to the rule established by the *Goudy* decision:

Goudy did not rest exclusively, or even primarily, on the § 6 grant of personal jurisdiction over allottees to sustain the land taxes at issue [in that case]. Instead, it was the *alienability of the allotted lands* – a consequence produced in those cases not by § 6 of the General Allotment Act, but by § 5 – that the Court found of central significance.

...

Thus, when § 5 rendered the allotted lands alienable and encumberable, it also rendered them subject to assessment and forced sale for taxes.

Id. at 263-64 (footnote omitted; emphasis by Court.) Consistent with this straightforward language in the majority

opinion, it is apparent that the dissent in *Yakima*, while disagreeing with the majority's holding on the property tax issue itself, considered that holding to have been grounded on the alienability of the land allotted under section 5 of the GAA. *Id.* at 272-73 (Blackmun, J., concurring in part and dissenting in part). Thus, there was no disagreement on the Court that the basis for its holding of taxability in *Yakima* was the alienability of the land in question.

This rule – that alienable land owned in fee by an Indian tribe or its members is subject to taxation unless explicitly exempt – has been in existence since the *Goudy* decision in 1906. With its reaffirmation in *Yakima*, the rule affords property tax assessors a consistent, fair, and ascertainable standard by which to classify real property, whether it is owned by an Indian tribe, a tribe member, or a non-Indian: if it is freely alienable it is subject to taxation unless exempt under a specific statutory or constitutional provision.

As longstanding legal precedent, the *Goudy/Yakima* rule deserves great deference under the principle of *stare decisis*. This is especially true because, in *Goudy* and *Yakima*, this Court interpreted Congressional enactments. As the Court has stated:

Adherence to precedent is, in the usual case, a cardinal and guiding principle of adjudication, and "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done."

California v. Federal Energy Regulatory Commission, 495 U.S. 490, 499 (1990), *reh. denied*, 497 U.S. 1040 (1990)(quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989)). Thus, if Congress had disagreed with the Court's decisions in *Goudy* and *Yakima*, it could have overruled either decision. The fact that the *Goudy/Yakima* principle has not been overruled by legislation is indicative of Congress' agreement with that principle.

B. In Holding That The Pine Lands And Homestead Parcels Are Exempt From Property Taxation, The Court Of Appeals Misread Both The *Yakima* And *Goudy* Decisions.

The *Yakima* decision fits squarely within the "alienability equals taxability" rule first established in *Goudy*. Nevertheless, the court of appeals declined to interpret *Yakima* in this manner and held that only fee land allotted both under the GAA (as incorporated into section 3 of the Nelson Act) and after enactment of the Burke Act is subject to taxation. Pet. App. 22-23. That holding is erroneous for a number of reasons: (1) validation of the property tax at issue in *Yakima* was not, as the court of appeals concluded, based on the express language of the Burke Act proviso; (2) invalidation of the excise tax at issue in *Yakima* does not imply, as stated by the court of appeals, that this Court would have upheld that tax if its decision on the property tax issue had been grounded on the alienability of the land; (3) the remand ordered by the Court in *Yakima* does not, as the court of appeals concluded, indicate that the *Yakima* decision was not based on the alienability of the land in question; (4) the absence

of explicit language in the Nelson Act authorizing taxation of the pine land and homestead parcels does not indicate a Congressional intent to exempt those parcels from taxation. In addition, the court of appeals decision, if left to stand, would produce anomalous results in the classification of property for tax purposes, as well as place an undue burden on property tax assessors in the administration of property tax laws.

1. The court of appeals erroneously concluded that this Court based its validation of the property tax in *Yakima* on the Burke Act amendment to section 6 of the GAA (the Burke Act proviso).

The primary basis for the court of appeals' interpretation of *Yakima* was its conclusion that: "The express language of the Burke Act proviso in § 6 of the GAA was needed to make sufficiently clear the intent of Congress to allow state ad valorem taxes." Pet. App. 21. Thus, the court erroneously concluded that *Yakima* must have relied on both section 5 and section 6 of the GAA in determining that the land at issue in that case was subject to taxation. *Id.* at 20-21.

To the contrary, in *Yakima* this Court discussed *Goudy* as the seminal case for the "alienability equals taxability" principle:

As the first basis of its decision, before reaching the "further" point of personal jurisdiction under § 6, *id.* at 149, the *Goudy* Court said that, although it was certainly possible for Congress to "grant the power of voluntary sale, while withholding the land from taxation or forced alienation," such an

intent would not be presumed *unless it was "clearly manifested."*

502 U.S. at 263 (emphasis added). Neither the *Yakima* Court nor the *Goudy* Court found such a clear manifestation of intent on the part of Congress. Those decisions, then, must have been based on the alienability of the lands in question, which in *Yakima* was the result of section 5 of the GAA. As this Court pointed out in *Yakima*, the *Goudy* Court reached its decision upholding taxation of the GAA allottee's land "without even mentioning the Burke Act proviso." *Id.* at 259.⁸ In sum, *Yakima* reiterated the rule first set out in *Goudy*: freely alienable land owned in fee by a tribe or its members is subject to a state's tax laws in the absence of a clear statement by Congress to the contrary.

In contrast to the Eighth Circuit's misreading of the *Yakima* decision, the Ninth Circuit correctly read *Yakima* to stand for the proposition that freely alienable land patented in fee and reacquired in fee by an Indian tribe or its members, unless exempt under some provision of law, is subject to ad valorem taxation irrespective of the statute or treaty under which it was patented. See *Lummi Indian Tribe v. Whatcom County, Wash.*, 5 F.3d 1355, 1357 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 2727 (1994). The *Lummi* Court also emphasized this Court's observation in

⁸ In acknowledging that *Goudy* did not refer to the Burke Act proviso in arriving at its decision, the court of appeals explained that fact away by stating that the proviso's language "was presumably available for the consideration of the Court." Pet. App. 21 n.11. That fact does not explain why the *Goudy* Court, if it considered the proviso essential to its holding of taxability, not once mentioned it in its opinion.

Yakima that it would not be presumed Congress intended to free land from restricted trust status while at the same time maintaining its exemption from taxation, which is a key element of trust status. *Id.* at 1358.⁹

The Eighth Circuit dissent in this case also read *Yakima* correctly as having based its determination of taxability on the land's alienability, with the Burke Act constituting "nothing more than additional support for its holding that alienability resulted in taxability." (Magill, J., concurring in part and dissenting in part). Pet. App. 27 n.15.

2. The fact that the *Yakima* decision struck down the excise tax imposed on sales of land does not support the court of appeals decision in this case.

The court of appeals also found support for its decision in the determination by this Court in *Yakima* that the excise tax levied by Yakima County on sales of land owned by the Tribe or its members is not authorized by the GAA. The majority concluded that:

[i]f alienability always equals taxability, it should be the nature of the property right, not the nature of the tax, that matters. If that were the rule, the Court should have upheld both the ad

⁹ In a decision to the contrary, the Sixth Circuit held that the *Yakima* decision upholding the property tax was based on the explicit language of the Burke Act proviso. See *Saginaw Chippewa Indian Tribe v. State of Michigan*, 106 F.3d 130, 132-33 (6th Cir. 1997), Petition for Writ of Certiorari filed. See 66 USLW 3085 (June 30, 1997) (No. 97-14).

valorem and the excise taxes levied by the County since the land was made alienable by the GAA.

Pet. App. 13.

That conclusion is incorrect. While the Court recognized that an excise tax on sales of land "would be fully in accord with *Goudy's* emphasis upon the consequences of alienability," the Court read the Burke Act proviso as arguably not permitting imposition of the excise tax. 502 U.S. at 268-69. In determining that it was not clear whether the jurisdictional language in the proviso permitted a tax on "sales" of land as distinguished from a tax on the land itself, *id.* at 268, the Court, invoking the principle that ambiguities in the law are to be resolved in favor of the Indians, stated:

The short of the matter is that the General Allotment Act explicitly authorizes only "taxation of . . . land," not "taxation with respect to land," "taxation of transactions involving land," or "taxation based on the value of land." Because it is eminently reasonable to interpret that language as not including a tax upon the sale of real estate, our cases require us to apply that interpretation for the benefit of the Tribe. Accordingly, Yakima County's excise tax on sales of land cannot be sustained.

Id. at 268-69.

Thus, the *Yakima* Court drew a distinction between the property tax and the excise tax based on its conclusion that the GAA clearly authorized a tax on land, but not a tax on sales of land. For that reason, the invalidation of the excise tax does not even arguably imply, as

asserted by the court of appeals, that this Court would have upheld that tax if it had based its decision upholding the property tax on the alienability of the land in question.¹⁰ To the contrary, the Court's ruling on the excise tax issue serves to highlight the fact that the Court, in reaffirming its holding in *Goudy*, found no ambiguity in section 5 of the GAA permitting taxation of fee-patented land after expiration of the restrictive trust period set out in that section.

3. The remand in *Yakima* does not support the court of appeals decision in this case.

The final reason expressed by the court of appeals for its determination that the Burke Act proviso is controlling on the property tax issue, is the fact that this Court ordered a remand in *Yakima* based on the contention by the Yakima Nation that it was not clear whether the lands in question had been patented under the GAA or under "some other statutes in force prior to the Indian Reorganization Act." Pet. App. 13-14 (citing 502 U.S. at 270). In ordering the remand this Court stated: "We leave for remand that factual point, and the prior legal question whether it makes any difference." *Yakima*, 502 U.S. at 270.

¹⁰ See also *Saginaw Chippewa Indian Tribe v. State of Michigan*, 106 F.3d 130, 133-34 (6th Cir. 1997), making the same interpretational error with respect to the invalidation of the excise tax in *Yakima*.

The court of appeals majority stated with respect to this remand that:

[I]f alienability were equivalent to taxability, it is difficult to explain the terms of the remand in *Yakima*. That remand left open the question of whether land allotted under a different act might be taxed or not. If alienability equaled taxability it should not have mattered under which act the land was made alienable – the mere fact of alienability should have been enough to allow state taxation.

Pet. App. 13-14 (footnote omitted). Contrary to this conclusion, the *Yakima* Court, in recognizing, as explained in *Goudy*, that Congress could make freely alienable land exempt from taxation if its intention to do so was "clearly manifested," ordered the remand to determine whether any of the land parcels in question had been patented under such a statute or treaty, or, for that matter, under some provision of law restricting their alienability.¹¹ See 502 U.S. at 270. Thus, the remand in *Yakima* to resolve the question of whether any of the lands at issue may have been allotted under a statute or treaty expressly restricting their alienability or exempting them from taxation is not inconsistent with the principle that land made freely

¹¹ The statutes cited by the *Yakima* Court in connection with its remand, 502 U.S. at 270, all involve, in some way, restrictions on alienability: 25 U.S.C. § 320 (1996) (acquisition of land by railway company applicable only to allotted land not yet fully alienable); 25 U.S.C. § 379 (1996) (sale of trust land by heirs of allottee); 25 U.S.C. § 404 (1996) (sale of trust land by allottee or heirs of allottee); 25 U.S.C. § 405 (1996) (sale of land "containing restrictions against alienation").

alienable by Congress is subject to taxation unless Congress has made a clear statement to the contrary.

For these reasons, the remand does not support the court of appeals' conclusion that the *Yakima* decision was based on the Burke Act proviso as the controlling statute. If anything, the remand supports the district court's decision and the County's position in this case that the alienability of the land, in the absence of an "unmistakably clear" exemption by Congress, was the basis for the Court's holding of taxability on the ad valorem tax issue.

4. The absence of explicit language in the Nelson Act authorizing taxation of the pine lands and homestead parcels does not indicate an intent on the part of Congress to exempt those parcels from taxation.

The court of appeals found support for its decision in the lack of any explicit authorization for ad valorem taxation in the pine land and homestead sections of the Nelson Act. Pet. App. 22. The absence of such authorization, however, is understandable. The pine land and homestead parcels were intended to be sold to non-Indian purchasers rather than allotted to individual members of the Tribe, and for that reason Congress naturally presumed that those lands would be subject to state taxation. With that presumption in mind, there was no need for Congress to give its express permission to impose a tax on them.

5. The court of appeals decision in this case would produce both serious administrative problems for property tax assessors and inequitable results in the classification for tax purposes of Indian-owned lands.

It is apparent that the *Yakima* decision, as interpreted by the *Lummi* court and both the dissent and the district court in this case, establishes an ascertainable and fair standard for the administration of property tax laws: fee-owned land which was patented in fee is subject to taxation unless exempt under some provision of statutory or constitutional law. See *Yakima*, 502 U.S. at 265 (stating that: "parcel-by-parcel determinations" required to be made by the tax assessor "on the reservation do not differ significantly from those he must make off the reservation, to take account of immunities or exemptions enjoyed, for example, by federally owned, state-owned, and church-owned lands").

In contrast, the Eighth Circuit decision, if allowed to stand, would produce anomalous and unfair results. Rather than classifying fee-patented land owned by an Indian tribe or its members in accordance with applicable statutory and constitutional provisions, the Eighth Circuit decision would result in the classification of such land as taxable or exempt based on when, under what statute or treaty, and to whom, it was patented in fee. In the case of Cass County, for example, lands originally sold to non-Indians pursuant to the Nelson Act as alienable and taxable pine lands or homesteads, upon reacquisition in fee by the Tribe, would enjoy the same tax-exempt status as do lands held in trust for the Tribe by the United States

government. Conversely, lands patented in fee to individual members of the Tribe pursuant to the Nelson Act (in conformity with the allotment provisions of the GAA) after passage of the Burke Act, upon reacquisition in fee by the Tribe, would be subject to taxation.

In addition, the Eighth Circuit decision in this case, if allowed to stand, would require a property tax assessor in Minnesota not only to determine whether land owned by a Tribe or its members had been patented under section 3 (potentially taxable) or sections 4, 5 and 6 (exempt) of the Nelson Act, but, if it had been patented under section 3, to determine whether the patent was granted before or after passage of the Burke Act in 1906. Such a requirement with respect to each parcel of land would produce unduly burdensome administrative problems for state and local property tax officials. This Court could not have intended the burdensome and anomalous consequences which surely will flow from this court of appeals decision if it is allowed to stand.

—♦—

CONCLUSION

For the foregoing reasons, the decision of the Eighth Circuit Court of appeals should be reversed.

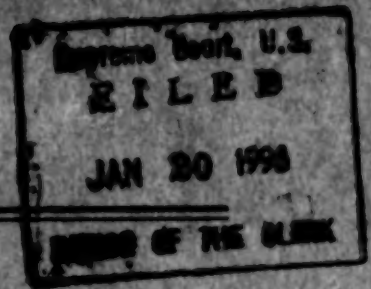
December 15, 1997

Of Counsel:

MARK B. LEVINGER
JAMES W. NEHER
Assistant Attorneys General
State of Minnesota

Respectfully submitted,
Office of Cass County
Attorney
EARL E. MAUS
Cass County Attorney
Counsel of Record
Cass County Courthouse
P.O. Box 3000
Walker, MN 56484
Telephone: (218) 547-7255
Counsel for Petitioners

(14)
No. 97-174



In the
Supreme Court of the United States
October Term, 1997

CASS COUNTY, MINNESOTA; SHARON K.
ANDERSON, in her official capacity as Cass County
Auditor; MARGE L. DANIELS, in her official capacity as
Cass County Treasurer; STEVE KUHA, in his official
capacity as Cass County Assessor; JAMES DEMGEN, in
his official capacity as Cass County Commissioner; JOHN
STRANNE, in his official capacity as Cass County
Commissioner; GLEN WITHAM, in his official capacity as
Cass County Commissioner; ERWIN OSTLUND, in his
official capacity as Cass County Commissioner;
VIRGIL FOSTER, in his official capacity as
Cass County Commissioner,

Petitioners,

vs.

LEECH LAKE BAND OF CHIPPEWA INDIANS,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT

James M. Schoessler
Counsel of Record
Steven G. Thorne
Joseph F. Halloran
Jacobson, Buffalo, Schoessler
& Magnuson, Ltd.
Suite 810 Lumber Exchange Bldg.
10 South Fifth Street
Minneapolis, Minnesota 55402
(612) 339-2071
Counsel for Respondent

QUESTION PRESENTED

Whether the mere fact that Indian tribal government-owned land is freely alienable evidences unmistakably clear congressional intent to grant property tax jurisdiction to county governments, and, if so, whether the lands at issue in this appeal are freely alienable.

TABLE OF CONTENTS

QUESTION PRESENTED.....	i
TABLE OF CONTENTS.....	ii
TABLE OF CITED AUTHORITIES.....	v
STATEMENT OF THE CASE.....	1
SUMMARY OF ARGUMENT.....	3
ARGUMENT.....	7
I. THE "UNMISTAKABLY CLEAR INTENT" RULE DETERMINES WHETHER CASS COUNTY HAS JURISDICTION TO TAX TRIBAL LAND.....	7
II. NEITHER THE NELSON ACT NOR THE GENERAL ALLOTMENT ACT EXPRESSES AN UNMISTAKABLY CLEAR INTENT TO ALLOW LOCAL TAXATION OF A TRIBE THAT PURCHASED LANDS ORIGINALLY SOLD TO NON-INDIANS AS PINE LANDS OR HOMESTEADS.....	11
III. THE STATUTE-SPECIFIC APPROACH OF THE COURT OF APPEALS, WHICH FOLLOWED THE APPROACH OF <i>YAKIMA</i> , REPRESENTS A WORKABLE APPROACH TO TRIBAL PROPERTY TAXATION ISSUES.....	14

IV. THE FREE ALIENABILITY OF LAND, BY ITSELF, DOES NOT CONSTITUTE UNMISTAKABLY CLEAR INTENT TO ALLOW COUNTY TAXATION OF TRIBAL FEE LANDS.....	17
A. Congress Historically Has Not Equated Alienability With Taxability.....	17
B. Implied State Tax Jurisdiction Over Tribal Land Infringes On Rights of Tribal Self-Government And Therefore Violates Judicial Precedent.....	21
C. Implied State Tax Jurisdiction Over Tribal Land Is Contrary To Express Congressional Policies Contained In The Indian Reorganization Act And Therefore Violates Congressional Intent.....	25
D. Implied State Tax Jurisdiction Over Tribal Land Is Contrary To Congressional Policy As Expressed In Recent Acts Of Congress And Therefore Violates Congressional Intent.....	29
E. Implied State Tax Jurisdiction Over Tribal Land Is Contrary To The Canons Of Construction Of Federal Statutes Dealing With Indians And Therefore Should Be Rejected.....	31
F. The <i>Yakima</i> Opinion Did Not Abolish the Unmistakably Clear Intent Rule and Substitute A New Rule Equating Alienability With Taxability.....	33
1. The Court Of Appeals Correctly Rejected Cass County's Strained Reading Of <i>Yakima</i> And Correctly Interpreted The Decision As Requiring A Detailed Examination Of Statutory Language And Intent.....	33

2. The Court Of Appeals Correctly Concluded That The *Goudy* Decision Does Not Require A Rule Equating Alienability With Taxability.....36

V. EVEN IF ALIENABILITY DETERMINES TAX-ABILITY, TRIBAL FEE LAND CANNOT BE TAXED BECAUSE THE INDIAN NONINTERCOURSE ACT RENDERS IT INALIENABLE.....41

- A. The Plain Language Of The Indian Nonintercourse Act Protects All Tribal Lands From Alienation Without The Consent Of The United States.41
- B. The Plain Meaning Of The Indian Nonintercourse Act Is Consistent With The Purpose Of The Act.43
- C. Courts Have Consistently Construed The Plain Language Of The Indian Nonintercourse Act To Include Fee Lands.46
- D. Congress Has Recognized That The Indian Nonintercourse Act Protects Fee Land.48

CONCLUSION.....50

TABLE OF CITED AUTHORITIES

<u>Description</u>	<u>Page No.</u>
<u>Federal Case Law:</u>	
<i>Alonzo v. United States</i> , 249 F.2d 189 (10th Cir. 1957)	47
<i>Brendale v. Yakima Indian Nation</i> , 492 U.S. 408 (1989)	13, 23
<i>Bryan v. Itasca County</i> , 426 U.S. 373 (1976)	passim
<i>California v. Cabazon Band of Mission Indians</i> , 480 U.S. 202 (1987)	4, 7, 9, 30
<i>Catawba Indian Tribe of South Carolina v. South Carolina</i> , 718 F.2d 1291 (4th Cir. 1983)	41
<i>Cayuga Indian Nation of New York v. Cuomo</i> , 565 F. Supp. 1297 (N.D.N.Y. 1983)	42, 44, 45
<i>Choate v. Trapp</i> , 224 U.S. 665 (1912).....	19, 20, 32
<i>Cotton Petroleum Corporation v. New Mexico</i> , 490 U.S. 163 (1989)	9, 32
<i>County of Oneida v. Oneida Indian Nation</i> , 470 U.S. 226 (1985)	32, 45
<i>County of Yakima v. Yakima Indian Nation</i> , 502 U.S. 251 (1992)	passim
<i>DeLima v. Bidwell</i> , 182 U.S. 1 (1900)	44
<i>Erlenbaugh v. United States</i> , 409 U.S. 239 (1972).....	48

<i>Estate of Cowart v. Nicklos Drilling Company</i> , 505 U.S. 469 (1992)	42
<i>F.D.I.C. v. Meyer</i> , 510 U.S. 471 (1994)	42
<i>Federal Power Comm'n. v. Tuscarora Indian Nation</i> , 362 U.S. 99 (1960)	43, 47
<i>Fletcher v. Peck</i> , 10 U.S. (6 Cranch) 87 (1809)	43
<i>Goudy v. Meath</i> , 203 U.S. 146 (1906)	<i>passim</i>
<i>In re Heff</i> , 197 U.S. 488 (1905)	37, 38, 39
<i>Iowa Mutual Ins. Co. v. LaPlante</i> , 480 U.S. 9 (1987)	30
<i>Johnson v. M'Intosh</i> , 21 U.S. (8 Wheat.) 543 (1823)	43
<i>Joint Tribal Council of the Passamaquoddy Tribe v. Morton</i> , 388 F. Supp. 649 (D. Maine 1975)	42
<i>Joint Passamaquoddy Tribe v. Morton</i> , 528 F.2d 370 (1st Cir. 1975)	47
<i>The Kansas Indians</i> , 72 U.S. (5 Wall.) 737 (1867)	8
<i>Leech Lake Band of Chippewa Indians v. Herbst</i> , 334 F. Supp. 1001 (D.Minn. 1971)	12
<i>Lone Wolf v. Hitchcock</i> , 187 U.S. 553 (1903)	8
<i>Lummi Indian Tribe v. Whatcom County, Washington</i> , 5 F.3d 1355 (9th Cir. 1993)	2, 33
<i>McCulloch v. Maryland</i> , 17 U.S. (4 Wheat.) 316 (1819)	10

<i>Mashpee Tribe v. New Seabury Corp.</i> , 592 F.2d 575 (1st Cir. 1979)	45
<i>Mashpee Tribe v. Town of Mashpee</i> , 447 F. Supp. 940 (D. Mass. 1978)	45
<i>Mattz v. Arnett</i> , 412 U.S. 481 (1973)	13
<i>McClanahan v. Arizona State Tax Comm'n.</i> , 411 U.S. 164 (1973)	8, 40
<i>Mescalero Apache Tribe v. Jones</i> , 411 U.S. 145 (1973)	8
<i>Moe v. Confederated Salish and Kootnai Tribes</i> , 425 U.S. 463 (1976)	26, 40
<i>Mohegan Tribe v. Connecticut</i> , 638 F.2d 612 (2d Cir. 1980)	42, 45
<i>Montana v. Blackfeet Tribe</i> , 471 U.S. 759 (1985)	7, 8, 32
<i>Montana v. United States</i> , 450 U.S. 544 (1981)	13, 22
<i>Narragansett Tribe of Indians v. Southern R.I. Land Dev. Corp.</i> , 418 F. Supp. 797 (D.R.I. 1976)	45
<i>The New York Indians</i> , 72 U.S. (5 Wall.) 761 (1867)	8
<i>Oklahoma Tax Comm'n v. Sac and Fox Nation</i> , 508 U.S. 114 (1993)	9, 10
<i>Oklahoma Tax Comm'n v. Chickasaw Nation</i> , 515 U.S. 450 (1995)	4, 9
<i>Oneida Indian Nation of New York v. County of Oneida</i> , 719 F.2d 525 (2d Cir. 1983)	45, 47

<i>Ramah Navajo School Board v. Bureau of Rev. of New Mexico</i> , 458 U.S. 832 (1982)	32
<i>Reves v. Ernst & Young</i> , 507 U.S. 170 (1993)	42
<i>Santa Rosa Band Of Indians v. Kings County</i> , 532 F.2d 655 (9th Cir. 1975)	30
<i>South Dakota v. Bourland</i> , 508 U.S. 679 (1993)	22
<i>Southern Ute Indian Tribe v. Board of County Commissions of LaPlata County</i> , 855 F.Supp 1194 (D. Colo. 1994) ...	34, 36
<i>State v. A-1 Contractors</i> , ____ U.S. ____, 117 S.Ct. 1404 (1997)	22
<i>Tonkawa Tribe of Oklahoma v. Richards</i> , 75 F.3d 1039 (5th Cir. 1996)	46
<i>Tulee v. Washington</i> , 315 U.S. 681 (1942)	32
<i>Tuscarora Nation v. Power Authority of the State of New York</i> , 257 F.2d 885 (C.A.2, 1958)	49
<i>Tuscarora Indian Nation v. Federal Power Commission</i> , 265 F.2d 338 (C.A.,D.C. Cir. 1958)	49
<i>United States v. Alvarez-Sanchez</i> , 511 U.S. 350 (1994)	42
<i>United States v. Browder</i> , 113 F.2d 97 (2d Cir. 1940)	44
<i>United States v. Candelaria</i> , 271 U.S. 432 (1926)	47
<i>United States Ex rel. Saginaw Chippewa Tribe v. Michigan</i> , 106 F.3d 130 (6th Cir. 1997)	5, 34, 35
<i>United States v. Mazurie</i> , 419 U.S. 544 (1975)	21

<i>United States v. Minnesota</i> , 270 U.S. 181 (1926)	11
<i>United States v. Nice</i> , 241 U.S. 591 (1916)	37
<i>United States v. Sandoval</i> , 231 U.S. 28 (1913)	47
<i>United States v. 7.405.3 Acres of Land</i> , 97 F.2d 417 (4th Cir. 1938)	47
<i>United States v. Stewart</i> , 311 U.S. 60 (1940)	48
<i>United States v. Turkette</i> , 452 U.S. 576 (1981)	42
<i>United States v. University of New Mexico</i> , 731 F.2d 703 (10th Cir. 1984)	47
<i>United States v. Wheeler</i> , 435 U.S. 313 (1978)	8, 21
<i>Washington v. Confederated Tribes of Colville Reservation</i> , 447 U.S. 134 (1980)	21, 40
<i>White Earth Band of Chippewa Indians v. Alexander</i> , 683 F.2d 1129 (8th Cir. 1982)	12
<i>Williams v. Lee</i> , 358 U.S. 217 (1959)	8, 21
<i>Wilson v. Marchington</i> , 127 F.3d 805 (9th Cir. 1997)	48
<i>Worcester v. Georgia</i> , 31 U.S. (6 Pet.) 515 (1832)	7, 8

State Case Law:

<i>Battese v. Apache County</i> , 129 Ariz. 295, 630 P.2d 1027 (1981)	14
<i>Goudy v. Meath</i> , 38 Wash. 126, 80 P. 295 (1905)	36, 39
<i>Mayes v. Cherokee Strip Livestock Ass'n</i> , 58 Kan. 712, 51 P. 211 (1897)	45
<i>State v. Forge</i> , 262 N.W.2d 341 (Minn. 1977)	3, 13
<i>State v. Clark</i> , 282 N.W.2d 902 (Minn. 1979)	12

Federal Statutes:

Act of February 25, 1920, ch. 87, 41 Stat. 452	18
Act of July 1, 1902, ch. 1362, 32 Stat. 657	19
Act of June 30, 1919, ch. 4, 41 Stat. 3	18
Act of March 30, 1802, ch. 13, 2 Stat. 139)	41
Act of March 3, 1891, ch. 561, 26 Stat. 1097	12
Act of May 27, 1908, ch. 199, 35 Stat. 312	18, 19, 20
Act of June 30, 1834, ch. 161, § 12, 4 Stat. 730	41
Burke Act of 1906, ch. 2348, 34 Stat. 182 (1906)	2, 11, 34
Clean Water Act Amendments of 1991, 42 U.S.C. 7602 (1995)	30
Curtis Act of June 28, 1898, ch. 517, 30 Stat. 495	17, 19

General Allotment Act of February 8, 1887, ch. 119, 24 Stat. 338 (1887)	<i>passim</i>
Indian Nonintercourse Act, 25 U.S.C. § 177	<i>passim</i>
Indian Tribal Justice Act, 25 U.S.C. §§ 3601, 3602, 3611, 3612, 3614, 3621, 3631 (1995)	31
Indian Child Welfare Act of 1978, 25 U.S.C. § 1901-63 (1995)	30
Indian Self-Determination and Education Assistance Act, of 1975, 25 U.S.C. § 450a(b) (1995)	31
Indian Financing Act of 1974, 25 U.S.C. § 1451 (1995)	30
Indian Reorganization Act of June 18, 1934, ch. 576, 48 Stat. 984	<i>passim</i>
Navajo-Hopi Rehabilitation Act of 1950, 25 U.S.C. § 635	48
Nelson Act of January 14, 1889, ch. 24, 25 Stat. 642	<i>passim</i>
Pub. L. 86-505 § 1, 74 Stat. 199.	48
Pub. L. 101-630, 104 Stat. 4531	49
Pub. L. 101-379, 104 Stat. 473	49
Pub. L. 102-497, 106 Stat. 3255	49
Pub. L. 102-575, § 503, 106 Stat. 4600	50
Pub. L. 103-435, 108 Stat. 4566	50
Pub. L. 103-116, 107 Stat. 1136	50

Public Law 280, 67 Stat. 588	9, 28, 29, 30
Trade and Intercourse Act of July 22, 1790, ch. 33, § 4, 1 Stat. 137	41
Tribal Self-Governance Demonstration Project Act of 1991, 25 U.S.C. § 450f (1995)	30

Federal Legislative Materials:

35 Cong. Rec. 90 (1906)	25
H.R. Rep. No. 1648, 86th cong., 2d Sess., 1960, <i>reprinted in</i> 1960 U.S.C.C.A.N. 2352	49
H.R. Rep. No. 687, 101st Cong., 2d Sess., 1990, <i>reprinted in</i> 1990 U.S.C.C.A.N. 6336	49
S.Rep. No. 1080, 73d Cong., 2d Sess. 2, 1934	28
S.Rep. No. 428, 102 Cong., 2d Sess., 1992, <i>reprinted in</i> 1992 U.S.C.C.A.N. 2620	50

State Statutes:

Minn. Stat. § 272.02, subd. 1 (1997 Supp.)	15
--	----

Treaties, Law Reviews and Law Journals:

A. Dussias, <i>Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision</i> , 55 U Pitt. L. Rev.1 (1993)	25
---	----

Felix Cohen, <i>Handbook of Federal Indian Law</i> (1982 ed.)	13, 43, 44
Francis Paul Prucha, <i>The Great Father: The United States Government and the American Indians</i> (1984)	26, 27, 28
Francis Paul Prucha (ed.), <i>Documents of United States Indian Policy</i> (2d ed., 1990)	25
Judith V. Royster, <i>The Legacy of Allotment</i> , 27 Ariz. St. L. J. 1 (1993)	28
Philip P. Frickey, <i>Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law</i> , 107 Harv. L. Rev. 381 (1993)	29, 32
Robert N. Clinton and Margaret Tobey Hotopp, <i>Judicial Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims</i> , 31 Maine L. Rev. 17 (1979)	46
Robert Clinton, <i>Isolated in Their Own Country: A Defense of Indian Autonomy and Self Government</i> , 33 Stanford L. Rev. 979 (1981)	23
Hon. Earl B. Gustafson, <i>Challenging Unequal Property Tax Assessments in Minnesota</i> , 13 Wm. Mitchell L. Rev. 461 (1987)	16
Yuanchung Lee, <i>Rediscovering the Constitutional Lineage of Federal Indian Law</i> , 27 New Mexico L.Rev. 273 (1997)	26

Miscellaneous:

Comm'n. Ind. Aff., 1934 Ann. Rep.	24, 28
James E. Carter, <i>State of the Union Address</i> , Pub. Papers 121 (1979)	31

18 Op. Att'y Gen. 235 (1885).....	42
Richard M. Nixon, <i>Special Message to the Congress on Indian Affairs</i> , Pub. Papers 564 (1970).....	31
Webster's New Universal Unabridged Dictionary (2d ed. 1979)	33
William J. Clinton, <i>Memorandum on Government-to-Government Relations with Native American Tribal Governments</i> , 30 Weekly Comp. Pres. Doc. 936 (May 2, 1994)	31

STATEMENT OF THE CASE

This case arises out of the efforts of the Leech Lake Reservation tribal government to purchase land on its reservation to rebuild the tribal land base and strengthen tribal institutions. Twenty-one parcels of land were recently purchased by the tribal government in fee. The Leech Lake Band (hereafter the "Band") lost these and other lands during the allotment era of the late 1800s and early 1900s by the operation of the Nelson Act of January 14, 1889, ch. 24, 25 Stat. 642 (1889) (hereafter "Nelson Act") (Res. App. at A-1-A-8).

The Nelson Act applied only to Minnesota and authorized the removal of land from tribal ownership by three methods. Some land was allotted to individual Indians pursuant to § 3 of the Nelson Act, which incorporated the procedures of the General Allotment Act of February 8, 1887 (also called the Dawes Act), ch. 119, 24 Stat. 388 (1887) (hereafter the "GAA") (Resp. App. at A-9-A-15). Some land was sold to non-Indians as pine lands under the specific and unique procedures of §§ 4 and 5 of the Nelson Act. Some land was conveyed to homesteaders pursuant to § 6 of the Nelson Act, which utilized the procedures of the general homestead laws. The parcels involved in this case include examples of each of these methods of disposal. Thirteen parcels were disposed of pursuant to § 3; seven parcels pursuant to §§ 4 and 5; and one parcel pursuant to § 6.

Prior to 1993, Cass County (hereafter the "County") did not impose ad valorem property taxes against tribal government fee lands. It only began to do so after this Court's decision in *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251 (1992). The Band brought suit to prevent such taxation, asserting that a local government had no jurisdiction to tax the property of a sovereign Indian government within its own reservation without unmistakably clear congressional permission.

With regard to parcels where the chain of title includes an allotment to an individual Indian under § 3 of the Nelson Act (utilizing the procedures of the GAA), the court of appeals held that it was bound by this Court's *Yakima* ruling. The court

interpreted *Yakima* to mean that Congress explicitly had granted jurisdiction to states to tax Indians and tribes in possession of such allotted lands. The court held that *Yakima* found a grant of jurisdiction in the combination of § 5 of the GAA and the 1906 Burke Act amendment to § 6 of the GAA. The court therefore ruled that *Yakima* required the conclusion that tribal governments, as well as individual Indians, could be taxed when they subsequently acquired such lands. The Band filed a Conditional Cross Petition for Writ of Certiorari on this aspect of the court of appeals decision, but this Court denied it on November 3, 1997.

With regard to the parcels of tribal fee land that originally were disposed of as pine lands or homesteads, the court of appeals held that it could find no indication of any congressional intent whatsoever in the Nelson Act or elsewhere to allow counties to tax a tribal government that owned such property. Consequently, the court ruled that traditional Indian law principles required the conclusion that a tribal government was immune from county taxation with regard to these parcels.

Cass County has argued that the Supreme Court's *Yakima* decision created what amounts to a new rule of tax jurisdiction applicable to all fee land, regardless of tribal ownership and regardless of the source of title. The County's interpretation is based on its presumption that if a tribe can alienate its land freely, there must be an implied congressional grant of jurisdiction to counties to tax a tribe for owning the land. The court of appeals rejected this interpretation, requiring more specific evidence of clear congressional intent than an implication derived from the alienability of land. The county filed a Petition for Writ of Certiorari seeking approval of its "alienability equals taxability" theory, arguing in part that the acceptance of this rule by the Court of Appeals for the Ninth Circuit created a conflict between circuits. See *Lummi Indian Tribe v. Whatcom County, Washington*, 5 F.3d 1355 (9th Cir. 1993), cert. denied, 512 U.S. 1228 (1994).

This Court granted Cass County's petition on October 31, 1997. The County's Petition questions the decision of the court of appeals to uphold the tax immunity of the Leech Lake tribal

government with regard to lands originally sold as pine lands under §§ 4 and 5 of the Nelson Act and as homesteads under § 6 of the Nelson Act—as opposed to lands originally allotted to individual Indians under § 3 of the Nelson Act pursuant to the procedures of the GAA. Accordingly, in this brief the Band will focus on the jurisdiction to tax the tribal government when it acquires lands that had once been conveyed as pine lands or homesteads.

SUMMARY OF ARGUMENT

The land at issue in this case is owned in fee by a tribal government and is located within the boundaries of an Indian reservation. The original Leech Lake Reservation in Minnesota was devastated by the policies of the allotment era, specifically the allotment and sales schemes of the GAA and the Nelson Act. Tribally owned land shrank to less than five percent of the reservation. *State v. Forge*, 262 N.W.2d 341, 343 and n. 1 (Minn. 1977), appeal dismissed 435 U.S. 919 (1977). In an effort to apply the policy goals of the Indian Reorganization Act of June 18, 1934, ch. 576, 48 Stat. 984, codified as amended at 25 U.S.C. § 461 *et seq.* (hereafter the "IRA"), and current federal Indian policy, the Band is attempting to rebuild its land base within its reservation. In the process it is rebuilding its tribal government and striving for economic self-sufficiency.

Cass County is imposing its property taxes on land purchased by the Band as part of its rebuilding effort. This is an attempt by one government to tax the property of another government. Several parcels of land that the County is attempting to tax were not originally allotments—unlike the lands at issue in *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251 (1992), which were all allotted to individual Indians pursuant to the GAA. Rather, several of the Leech Lake parcels in this case originally were sold by the methods specified in sections of the Nelson Act that contained no reference to the GAA or to taxation of tribal governments. The court of appeals ruled that Congress never explicitly granted jurisdiction to counties to tax a tribal

government that might come to own these non-GAA lands. The court of appeals was correct. The County's assertion of jurisdiction to tax a tribal government with respect to its fee lands within its own reservation is wrong for a number of reasons.

The primary reason that the County's tax is unjustified because Congress has never "with unmistakable clarity" given county governments the authority to tax the tribal government for ownership of the lands that are the subject of this appeal. The long-standing and widely-accepted rule of law in Indian taxation cases is what this Court has referred to as a "per se" rule against state or county taxation. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n. 17 (1987). As this Court concluded in *Yakima*, "[O]ur cases reveal a consistent practice of declining to find that Congress has authorized state taxation unless it has made its intention to do so unmistakably clear." *Yakima*, 502 U.S. 251, 258 (1992) (internal quotation marks omitted). The "unmistakably clear intent" rule has a long history, is fully consistent with congressional policy and judicial decisions for almost 200 years, and is grounded in principles of tribal sovereignty and federal preemption. It has never been revoked, and it has been cited with approval as recently as 1995. See *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995). This rule applies here.

Cass County desires to tax the Leech Lake government with respect to land that originally was sold to non-Indians as pine lands under §§ 4 and 5 of the Nelson Act and as homesteads under § 6 of that act. There is not even a remote reference in these sections to taxing jurisdiction over Indian tribes that may eventually come into possession of such lands. Neither the district court nor the court of appeals could identify any unmistakably clear congressional language regarding taxation. Lack of any reference whatsoever can hardly be equated with "unmistakably clear intent." Cass County has not identified any express congressional language in the Nelson Act or anywhere else that shows an unmistakable intent to allow taxation of the Leech Lake tribal government if it came to own such lands. Hence, there is a jurisdictional bar against such taxation because

it directly impacts an Indian tribe within its reservation (Indian country).

In the absence of any unmistakably clear statutory language, Cass County has been forced to invent a new rule of Indian taxation. Its proposed rule is admittedly based on an "implication" derived from the alienability of land. This purported rule of an implied grant of taxing jurisdiction does violence to both Supreme Court precedent and congressional policy. Furthermore, although the County argues that its purported rule has been clear and in existence since 1906, the County itself apparently never recognized its authority until 1993 when it began to tax Indian fee lands.

This Court's opinion in *Yakima*, cannot be read as supporting the County's new rule for Indian taxation. As the court of appeals correctly concluded, the County's reading of *Yakima* fails to consider the language and context of the entire *Yakima* opinion.¹ *Yakima* specifically upheld and applied the unmistakably clear intent rule. The decision found such intent after a detailed analysis of the wording and history of both §§ 5 and 6 of the GAA. The special wording of the Burke Act in § 6 was of obvious importance. If a simple "alienability equals taxability" rule were intended by this Court, one would have expected a far shorter opinion, a concise statement of the "new" rule, a much less detailed analysis of the words of the GAA, and a discussion of the need to reverse or modify the "unmistakably clear intent" rule.

Part III of the *Yakima* opinion and the decision to remand are also inconsistent with the County's asserted rule. Part III suggests that the language of the Burke Act of 1906 authorized an ad valorem property tax but not an excise tax on the sale of land. If alienability does equal taxability, Part III should have come to a different conclusion. Also, if alienability means taxability, one

¹ The conclusions of the Court of Appeals have been echoed by the Court of Appeals for the Sixth Circuit in its decision in *United States Ex rel. Saginaw Chippewa Tribe v. State of Michigan*, 106 F.3d 130 (6th Cir. 1997), a case involving tribal land within the Saginaw Reservation.

would expect different conclusions from the many prior decisions of this Court that struck down state attempts to tax such freely alienable items as motor homes, automobiles, tobacco products, and even money. Finally, as recognized by the court of appeals, if *Yakima* stood for an alienability equals taxability rule, there would have been no need for a remand in that case.

Rather than creating the new implied tax jurisdiction rule advocated by the County, *Yakima* instead reaffirmed the unmistakably clear intent rule, analyzed specific statutory wording and history, and found language indicating unmistakably clear intent to grant jurisdiction. That should continue to be the process for handling cases of this type. If that process is applied to lands disposed of under the pine land and homestead provisions of the Nelson Act, it leads to the conclusion that Congress has granted the County no jurisdiction to tax tribal government lands.

Cass County's proposed implied tax jurisdiction rule also contradicts historic congressional treatment of Indian tax jurisdiction, threatens the ability of tribes to govern themselves, improperly imposes non-Indian values on Indian governments, is incompatible with the IRA's emphasis on rebuilding tribal land bases and the development of tribal self-sufficiency, and is inconsistent with current congressional policies. The County's proposed rule also reverses the long-honored canons of construction for interpreting federal Indian statutes. Rather than interpreting ambiguities to the benefit of Indian tribes, the County would turn ambiguities against tribes by allowing implications to be substituted for unmistakably clear expressions of intent.

In sum, the County has misread *Yakima* and has proposed a new rule of law that is at odds with Supreme Court precedent, the federal government's trust responsibilities to Indian tribes, and decades of federal Indian policy. The County has ignored the plain meaning of the phrase "unmistakably clear" by asserting that it means "implied but not expressly stated." It has turned Indian law presumptions upside down by asserting that, unless the United States owns the asset, states have implied jurisdiction over Indian tribes unless Congress says otherwise. The court of appeals correctly identified the errors of this "alienability equals

taxability" approach to the taxation of Indian tribal land. In each case, as in *Yakima*, the language of statutes should be analyzed in detail and a conclusion reached based on the presence or absence of express congressional language.

Therefore, the County's proposed "alienability equals taxability" rule should be rejected. However, even if it were adopted, the holding of the court of appeals in this case should be affirmed. This is because Leech Lake tribal fee lands are not freely alienable in light of the constraints of the Indian Nonintercourse Act, 25 U.S.C. § 177. The plain wording of that act shows that Leech Lake tribal lands are not freely inalienable, and past judicial interpretations as well as current policy support the conclusion that this statute prevents the free alienation of tribal lands.

ARGUMENT

I. THE "UNMISTAKABLY CLEAR INTENT" RULE DETERMINES WHETHER CASS COUNTY HAS JURISDICTION TO TAX TRIBAL LAND.

The general rule that applies to Indian tax disputes is well-established and should be beyond dispute: state governments and their political subdivisions do not have inherent jurisdiction to tax tribes and tribal property within reservations. Congress may grant this power, but such a grant cannot rest on a vague or general implication. Rather, Congress must make its intent unmistakably clear. *Yakima*, 502 U.S. at 258, citing *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 and *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n. 17. The critical analytical question in this case, then, is whether Congress has indicated the requisite intent with the required clarity.

The immunity of Indian tribes from state or local taxation, at least in the absence of express congressional action to the contrary, extends back to the earliest days of our nation. Chief Justice Marshall first articulated the legal principle in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 556 (1832), in which he wrote

that Indian tribes are "distinct political communities, having territorial boundaries, within which their authority is exclusive . . ." Consequently, Marshall concluded, states generally have no jurisdiction within reservations.

In the mid-nineteenth century, the Supreme Court continued to follow the principles articulated by Chief Justice Marshall. In *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 755-57 (1867) and *The New York Indians*, 72 U.S. (5 Wall.) 761, 771-72 (1867), the Court ruled that states and their political subdivisions cannot tax Indian property inside reservations.

Over the years, this Court has acknowledged that Congress has plenary authority over Indian affairs and can grant states jurisdiction over reservations. *United States v. Wheeler*, 435 U.S. 313 (1978); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). The Court also has modified Justice Marshall's purely territorial view of inherent sovereignty by viewing it as an important backdrop against which to apply the additional concepts of "federal preemption" and "infringement" on tribal self-determination. *McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. 164 (1973) and *Williams v. Lee*, 358 U.S. 217 (1959).

Nevertheless, throughout the 165 years since the *Worcester* opinion, this Court has steadfastly protected the rights of tribes to be free of state or local taxation within their reservations absent clear and unambiguous action by Congress. For example, within the last twenty-five years the Court has endorsed the unmistakably clear intent rule in at least eight decisions.

In *McClanahan*, 411 U.S. at 171, the Court said, "Indian property on an Indian reservation [is] not subject to state taxation except by virtue of express authority . . . by act of Congress."

In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973), the Court said, "[I]n the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation."

In *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985), the Court said that it "consistently has held that it will find the

Indians' exemption from state taxes lifted only when Congress has made its intention to do so unmistakably clear." *Accord, Cotton Petroleum Corporation v. New Mexico*, 490 U.S. 163, 183 n. 14 (1989). *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n. 17 (1987), termed this a "per se rule" against state taxation of tribes and tribal members.

In the case relied on heavily by Cass County to justify its implication of taxability, *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251, 258 (1992), the Court concluded, "[O]ur cases reveal a consistent practice of declining to find that Congress has authorized state taxation unless it has made its intention to do so unmistakably clear" (internal references and quotation marks omitted).

Most recently, two decisions involving the Oklahoma Tax Commission have reiterated the rule. In *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 123 (1993) the Court wrote, "Absent explicit congressional direction to the contrary, we presume against a State's having the jurisdiction to tax within Indian country . . ." Two years later the Court reaffirmed what it termed a "categorical approach": "[A]bsent cession of jurisdiction or other federal statutes permitting it, we have held, state is without power to tax reservation lands and reservation Indians." *Oklahoma Tax Comm'n. v. Chickasaw Nation*, 515 U.S. 450, 458 (1995) (quoting *Yakima*, 502 U.S. at 258).

Even when a grant of state jurisdiction is written in broad terms, this Court has refused to allow state taxation absent strong and specific congressional language. For example, in *Bryan v. Itasca County*, 426 U.S. 373 (1976), a case involving the Leech Lake Reservation, the Court refused to find a grant of taxing authority in the broadly worded congressional grant of jurisdiction contained in Public Law 280, 28 U.S.C. § 1360. The *Bryan* Court held that even a broadly worded statute was not unmistakably clear enough to allow a county to impose a personal property tax on an Indian-owned mobile home—even though the mobile home was freely alienable.

The "unmistakably clear intent" rule thus has a long and consistent history. Not only is it supported by ample precedent, but it also is grounded in sound practical and political reasoning. Long ago, Chief Justice John Marshall analyzed the threats inherent in allowing one government to tax another. In *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819), Marshall produced his famous formulation: "That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another . . . are propositions not to be denied." Marshall's fears about the power to tax remain relevant in Indian country today. The history of the United States is a history of conflict, and occasionally open hostility, between Indian communities and surrounding local non-Indian populations and governments. The power to tax tribal government property can be used to limit the development of reservations, to diminish tribal holdings, and to wring political concessions from tribes.

As part of its trust duties to protect Indian peoples, the United States has been diligent in protecting tribal governments from destructive incursions by surrounding non-Indian governments. Congress has been protective by limiting its grants of jurisdiction to states. The Supreme Court has been protective by requiring express congressional language before it will allow states to exercise important jurisdiction. The basis of the Court's long and consistent protection of tribes from state jurisdiction is found both in the tradition of tribal sovereignty, which represents "a deeply rooted policy in our Nation's history of leaving Indians free from state jurisdiction and control," *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 123 (1993) (internal quotation marks omitted), as well as in principles of federal preemption. *Bryan v. Itasca County*, 426 U.S. 373, 376 n. 2 (1976). This helps explain the early development and consistent application of the "unmistakably clear intent" rule.

The unmistakably clear intent rule has been relied on for well over a century. There is no justification for changing or weakening it. It should remain intact and be applied to this case.

Cass County's approach is to change the rule through the back door. The County desires to establish an unmistakably clear intent by implication—not by direct statutory wording or express congressional action. To allow unmistakably clear intent to be proved by implication is to destroy the rule. The Court should not allow this to occur.

II. NEITHER THE NELSON ACT NOR THE GENERAL ALLOTMENT ACT EXPRESSES AN UNMISTAKABLY CLEAR INTENT TO ALLOW LOCAL TAXATION OF A TRIBE THAT PURCHASED LANDS ORIGINALLY SOLD TO NON-INDIANS AS PINE LANDS OR HOMESTEADS.

The court of appeals correctly held that Cass County does not have jurisdiction to tax tribal fee lands that originally were sold to non-Indians under the Nelson Act as pine lands or as homesteads. The County does not have such jurisdiction because no federal law, past or present, contains an unmistakably clear grant of authority to the County to tax these kinds of lands.

In *Yakima*, after an analysis of §§ 5 and 6 of the GAA of 1887, the Court found an unmistakably clear legislative intent to grant states taxing jurisdiction over lands allotted to individual Indians under that law. Since § 3 of the Nelson Act incorporated the provisions of the GAA, the district court and court of appeals concluded that *Yakima* required a holding that the parcels allotted pursuant to § 3 of the Nelson Act must also be taxable even when later purchased by a tribe.

However, §§ 4, 5 and 6 of the Nelson Act allowed lands to be sold to non-Indians as pine lands and homesteads. Sections 4, 5 and 6 (as well as the general homestead laws to which § 6 refers)² contain no reference to the GAA, contain no Burke Act

² The homestead laws themselves had absolutely nothing to do with Indian affairs or Indian reservations. Nowhere in the original Homestead Act of 1862, 12 Stat. 192, is there any reference to Indians or to taxation. The Homestead Act applied to "unappropriated public lands," and Indian lands did not fall into that category. See *United States v. Minnesota*, 270 U.S. 181, 206

proviso, and contain not even a hint of language about the taxability of such lands if they return to Indian ownership.

The entire history, purpose, and provisions of the Nelson Act dealt with the concentration of Minnesota's Indians and the disposition of surplus reservation lands³, and not with the taxability of tribal governments. As described by the court of appeals (108 F.3d at 823; Pet. App. at 6) the Nelson Act allotted certain lands to Indians either at White Earth or on their home reservations (§ 3), and provided for the disposal of the surplus lands. The surplus lands were either sold at auction as pine lands (§§ 4 and 5) or were subject to entry under the homestead laws (§ 6).

The primary purpose of the Nelson Act simply was to provide allotments to individual Indians and to open the remaining reservation lands to non-Indian logging and settlement. There is no reference in the Act to taxation, to tribal governments, or to tribal rights and immunities. The Act did not terminate the Band, diminish the Band's governmental sovereignty, or alter the boundaries of the Leech Lake Reservation.⁴

(1926). Congress made extensive amendments to the Homestead Act in the Act of March 3, 1891, ch. 561, 26 Stat. 1097. Section 10 of the amended Act referenced Indians merely by stating "[t]hat nothing in this act shall change, repeal, or modify any agreements or treaties made with any Indian tribes for the disposal of their lands, or of land ceded to the United States to be disposed of for the benefit of such tribes, and the proceeds thereof to be placed in the Treasury of the United States" Neither the original Homestead Act or the amendments to it created new law or indicated special intent with regard to taxation of Indian tribes.

³ See *State v. Clark*, 282 N.W.2d 902, 905 (Minn. 1979), cert. denied, 445 U.S. 904 (1979).

⁴ Although the Nelson Act substantially reduced tribal land ownership in many of the Minnesota reservations to which it applied, both state and federal courts repeatedly have rejected the notion that the Nelson Act disestablished any Minnesota reservations. See *White Earth Band of Chippewa Indians v. Alexander*, 683 F.2d 1129 (8th Cir. 1982), cert. denied, 459 U.S. 1070 (1982); *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F. Supp. 1001 (1971); *State v. Clark*, 282 N.W.2d 902 (Minn. 1979), cert. denied 445 U.S.

It is unlikely that Congress gave any thought to issues of taxation of tribal land. The assumed eventual, although not immediate, result of the federal allotment policies was that tribal governments would not survive, and that all Indians would be assimilated into non-Indian culture. See *Brendale v. Yakima Indian Nation*, 492 U.S. 408, 422-23 (1989); *Montana v. United States*, 450 U.S. 544, 559-60 n. 9 (1981).⁵

Since Congress was under the assumption that Indian tribal governments and tribal ownership would cease to exist at some future time, there was no need to think of, consider, or legislate about what would happen if surplus lands eventually went back into tribal ownership. This at most demonstrates a lack of consideration or intent; however, "lack of intent" falls far short of "unmistakably clear" intent. In order to equate the two, one would have to define away the "unmistakably clear intent" rule, impute to Congress an intent it could not possibly have formed or expressed given the historical setting, conclude that unmistakably clear intent really means intent by implication, and completely ignore canons of construction that require ambiguities to be construed in favor of Indian tribal rights.

The one certainty in this case is that the County can point to no language in the Nelson Act itself that even remotely refers to the taxation of pine lands and homesteads should they ultimately come into Indian tribal ownership. The district court could not find such language. It could only find taxing jurisdiction over

904 (1979); *State v. Forge*, 262 N.W.2d 341 (Minn. 1977), appeal dismissed 435 U.S. 919 (1977).

⁵ Undoubtedly, one of the ultimate goals of the allotment system was to break up tribal relations and tribal governments. In his treatise on Indian law, Felix Cohen called the allotment system "a systematic attempt to eradicate Indian heritage and tribalism." Felix Cohen, *Handbook of Federal Indian Law* 143 (1982 ed.) (hereafter "Cohen"). See also *Yakima*, 502 U.S. at 254. However, that would not happen immediately; fulfillment of these goals would come only by congressional action, presumably after all allotments had been made and all trusts had expired. See *Mattz v. Arnett*, 412 U.S. 481, 496 (1973). Before the goals were achieved, Congress repudiated the allotment system and its policy underpinnings.

these lands by adopting an "alienability equals taxability" theory. Absent such a theory, the court agreed that there was no other indication that such lands could be taxed by the County. *See* 908 F. Supp. at 696-97; Pet. App. at 46-48. Similarly, the court of appeals could identify no language expressing congressional intent regarding taxation of pine lands and homesteads: "These sections of the Act [Nelson Act §§ 4, 5, and 6], unlike § 3, did not incorporate the GAA or include any mention of an intent to tax lands distributed under them which might become reacquired by the Band in fee. These parcels are therefore not subject to state taxation." 108 F.3d at 829; Pet. App. at 22.

In the absence of an express statement of congressional intent in the Nelson Act, the Leech Lake tribal government should not be taxed for lands it now owns that originally left Indian ownership by means of pine land or homestead sales.⁶

III. THE STATUTE-SPECIFIC APPROACH OF THE COURT OF APPEALS, WHICH FOLLOWED THE APPROACH OF *YAKIMA*, REPRESENTS A WORKABLE APPROACH TO TRIBAL PROPERTY TAXATION ISSUES.

In order to find unmistakably clear congressional intent to allow county taxation of tribal property in any particular instance, a court must focus on the wording of the relevant legislation in its historic context. This fact-specific and legislation-specific analysis is what this Court undertook in its *Yakima* decision and is consistent with the unmistakably clear intent rule. It presents no insurmountable practical difficulties.

The court of appeals decision can be implemented in a completely straightforward fashion. The decision states that land originally allotted after 1906 to individual Indians under § 3 of the Nelson Act is taxable by Cass County under the rationale of the

⁶ *See also Battese v. Apache County*, 129 Ariz. 295, 630 P.2d 1027 (1981) (lands in Navajo Reservation originally homesteaded by a non-Indian held not taxable when subsequently acquired by Indian in fee).

Yakima decision; however, lands originally sold under other sections of the Nelson Act are not taxable when owned by the tribal government.

It is not difficult to determine how lands on the Leech Lake Reservation originally were disposed of. The task is little different from the analyses that title lawyers perform daily. Abstracts, patents, or county or federal land records are examined. These records show whether title to a particular parcel originated in a trust or fee patent given to an individual Indian, or whether it originated in a pine land sale or a homestead entry. If the parcel originally was allotted to an individual Indian, the appropriate county official can make the relevant notation concerning the taxability of the land. There is little mystery involved.

In any event, the burden on Cass County officials is minimal because, as a practical matter, the party claiming an exemption will bring that exemption to the County's attention. Hence, in order for tribal land to avoid tax assessment, the tribal government would have to present county officials with data and records substantiating that the land at issue was disposed of in ways other than allotment pursuant to § 3 of the Nelson Act. The county officials would merely have to receive the information, review it, and make the appropriate notations.

In fact, carrying out the court of appeals decision should be simpler than many other functions county officials must perform under Minnesota property tax laws. For example, Minnesota law exempts from real property taxation all public property exclusively used for any public purpose; wetlands (defined as land which is mostly under water, produces little if any income, and has no use except for wildlife or water conservation purposes); native prairie; property not exceeding one acre that is owned and operated by any senior citizen group; institutions of purely public charity; transitional housing facilities; academies; churches; and many other types of property difficult to identify without investigation—a total of twenty-nine separate exemptions. *See Minn. Stat. § 272.02, subd. 1* (1997 Supp.). The Band suggests that it is probably more time consuming for the County

to make many of the above determinations than it will be to obey the court of appeals decision.⁷

Cass County and its supporting *amici* conjure up images of nightmarish administrative complexities that they suggest will flow from the court of appeals decision. See Brief for Pet. at 24; Brief of Amici States of Michigan, et al. at 2-3; Brief of Amici National Association of Counties, et al. at 24. However, their claims are limited to generalizations unsupported by real and detailed concerns. As discussed above, the determination that county officials will have to make are straightforward and probably less complex than many other determinations they must make under Minnesota tax laws. The current case illustrates the actual process that likely will occur. The Band identified in its Complaint the parcels at issue and their title histories. Cass County officials reviewed the information and concurred. This is what will happen under the court of appeals ruling, not the parade of horrors suggested by the County and its supporters.

⁷ Likewise, the County's suggestion that determining the taxability of tribal fee land will unduly burden the assessment process and unduly complicate the Minnesota property tax scheme is not credible in the context of the overall Minnesota property tax scheme. As the Honorable Earl B. Gustafson, former Chief Judge of the Minnesota Tax Court, has observed,

The Minnesota Tax Study found that Minnesota has the oldest and one of the most complex real property tax classification systems in the nation. It clearly has the greatest number of classes. Depending upon whether various credits are considered, the number of classes have been estimated from between 20 and 70.

Hon. Earl B. Gustafson, *Challenging Unequal Property Tax Assessments in Minnesota*, 13 Wm. Mitchell L. Rev. 461, 461-462 n. 1 (1987). Although the Minnesota property tax system has undergone reform since 1987, it remains an extraordinarily complicated system. The burdens of implementing the court of appeals decision are trivial compared to the systematic difficulties tax officials deal with routinely.

IV. THE FREE ALIENABILITY OF LAND, BY ITSELF, DOES NOT CONSTITUTE UNMISTAKABLY CLEAR INTENT TO ALLOW COUNTY TAXATION OF TRIBAL FEE LANDS.

A. Congress Historically Has Not Equated Alienability With Taxability.

The unstated premise of Cass County's proposed rule of implied tax jurisdiction is that Congress must have meant to make the terms "alienability" and "taxability" functional equivalents. In other words, when the term "alienability" was used, Congress meant it to include the idea of state taxability. However, Congress historically has treated each of these terms independently and separately, and this Court has been careful to recognize that the terms do not, in fact, mean the same thing.

In other allotment era legislation, Congress did not treat the terms "alienable" and "taxable" as synonymous. For example, in 1898 Congress provided for the allotment of land in "the Indian Territory"—lands that had been excluded from the operation of the GAA. It did this by means of the Curtis Act of June 28, 1898, ch. 517, 30 Stat. 495, which made definite distinctions between alienability and taxability. The Act provided specifically for the *nontaxability* of all allotments while the title remained in the allottee, but in addition it allowed a portion of each allotment to be chosen as a homestead. In addition to being tax exempt, the homestead was *inalienable* for twenty-one years:

All the lands allotted shall be nontaxable while the title remains in the original allottee, but not to exceed twenty-one years from the date of patent, and each allottee shall select from his allotment a homestead of one hundred and sixty acres, for which he shall have a separate patent, and which shall be inalienable for twenty-one years from date of patent.

30 Stat. at 507 (emphasis added). Congress used the concepts of nontaxability and inalienability distinctly and for separate purposes. Some lands were nontaxable but still alienable, but homesteads would be both nontaxable and inalienable. This demonstrates that Congress knew the difference between nontaxability and inalienability, and did not assume that one meant the other.

Similarly, in the Act of June 30, 1919, ch. 4, 41 Stat. 3, Congress authorized allotments on the Blackfeet Indian Reservation. The Act provided:

That of the lands so allotted eighty acres of each allotment shall be designated as a homestead by the allottee and be evidenced by a trust patent and shall remain inalienable *and* nontaxable until Congress shall otherwise direct. . . .

41 Stat. at 16 (emphasis added). Again Congress referred to alienability and nontaxability as two different matters, to be treated separately. If the concept of nontaxability was intended to be necessarily included in the concept of inalienability, the separation of the terms in the Blackfeet Act would not have been made.

A like distinction was made in 1920, when Congress passed the Act of February 25, 1920, ch. 87, 41 Stat. 452, which authorized allotments to members of the Flathead Nation of Indians. That Act provided, "That not exceeding forty acres of each allotment made under the provisions of this Act shall be designated as a homestead which shall be inalienable *and* nontaxable during the minority of the allottee, and thereafter until such *restrictions* may be removed either by Congress or the Secretary of the Interior." 41 Stat. at 452 (emphasis added.) Congress used the terms "inalienable" and "nontaxable"

separately and referred to them in the plural as "restrictions." They were not considered the same.⁸

The Supreme Court, even in the midst of the allotment era, acknowledged that alienability and taxability were separate concepts. In *Choate v. Trapp*, 224 U.S. 665 (1912), the question was whether allotments given to members of the Choctaw and Chickasaw tribes could be taxed by the State of Oklahoma. The members of the tribes were allotted land under the provisions of the Curtis Act of June 28, 1898, ch. 517, 30 Stat. 495, as amended by the Act of July 1, 1902, ch. 1362, 32 Stat. 641. As discussed previously,¹⁰ the Act provided that *all* allotted land should be nontaxable for up to twenty-five years, as long as title remained in the original allottee, but that the portion selected by the allottee as a homestead specifically would be inalienable for twenty-one years.

The 1902 amendments to the Curtis Act made the non-homestead part of the allotments alienable within 5 years after the issuance of patents for such land. Subsequent congressional legislation (the Act of May 27, 1908, ch. 199, 35 Stat. 312) removed restrictions on alienation and on taxation of such land. The Supreme Court held that the specific congressional promises of tax exemption could not be withdrawn unilaterally by the

⁸ Congress also referred to taxability separately in the Act of May 27, 1908, ch. 199, 35 Stat. 312, "An Act For the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes, and for other purposes." Section 4 of that act stated specifically that "all land from which restrictions have been or shall be removed shall be *subject to taxation* and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes" 35 Stat. at 313 (emphasis added.) Again, taxability was treated specifically and separately from alienability.

⁹ This was a decision issued six years *after* the decision in *Goudy v. Meath*, 203 U.S. 146 (1906), the case relied on so heavily by the County. The *Choate* decision may help in understanding the result of the *Goudy* decision, which relied on far more than a mere implication of taxability for its result. See discussion *infra* pp. 36-40.

¹⁰ *Supra* pp. 17-18.

United States, and therefore Oklahoma could not tax the Indian land at issue.

The lesson of the *Choate* decision for the current appeal is contained in *Choate's* discussion of the separateness of the concepts of alienability and taxability. In *Choate*, 224 U.S. at 672, Oklahoma made essentially the same argument Cass County is making to this Court:

In other words, it is said [by the state] that the tax exemption was only an additional prohibition against a sale, so that when the restrictions against alienation were removed by the act of 1908 (35 Stat. at L. 312, chap. 199), the provisions as to nontaxability went as a necessary part thereof.

To this argument, the Supreme Court replied simply, "*But the exemption and nonalienability were two separate and distinct subjects.*" *Id.* at 673 (emphasis added). The Court added, "The defendant's argument also ignores the fact that, in this case, though the land could be sold after five years, it might remain nontaxable for 16 years longer, if the Indian retained title during that length of time." *Id.* The Court concluded that, as to alienability and nontaxability, "neither was dependent on the other." *Id.* If alienability and taxability were considered different for purposes of conditions on grants of specific patents, they certainly should be considered different for the much more significant issue of a general congressional grant of state jurisdiction over all Indians and tribes within reservations.

An examination of the history of congressional and Supreme Court treatment of taxability of Indian lands thus reveals that taxability is not a necessary consequence of alienability. Cass County's assumptions to the contrary are unjustified. The rejection by the court of appeals of the "alienability equals taxability" rule was correct and in accord with past congressional and judicial treatment of those concepts.

B. Implied State Tax Jurisdiction Over Tribal Land Infringes On Rights Of Tribal Self-Government And Therefore Violates Judicial Precedent.

Indian tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territory." *United States v. Mazurie*, 419 U.S. 544, 557 (1975). They possess the "inherent powers of a limited sovereignty which has never been extinguished." *United States v. Wheeler*, 435 U.S. 313, 322 (1978). They are subordinate to "only the Federal Government, not the States." *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154 (1980). These are among the reasons why courts have applied the "per se" rule against state taxation of tribes. That rule, by itself, should protect the Band here from any implied state tax jurisdiction.

However, even the more lenient rules developed by this Court for dealing with jurisdiction over non-Indian conduct within Indian country should also protect the Band here. State law does not even apply to non-Indians in a reservation if the state law infringes "on the right of reservation Indians to make their own laws and be governed by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959). County taxation of tribal land infringes in several ways on the Band's ability to govern itself in its own manner. Even under the *Williams* standard relating to non-Indian conduct, such taxation would not be allowed by implication. The case against state taxation of tribal governmental assets is much stronger, and certainly infringement is much more direct.

Two particularly harmful effects of state taxation are the weakening of tribal powers of self-determination and the subjection of tribal lands to the pressure of non-Indian values and markets. Both result in significantly limiting the choices Indian tribes can make about the kind of society they want to foster and protect in their reservations. Both tend to confine tribes to alternatives defined primarily by non-Indian culture and are thus antithetical to the fundamental principle underlying the infringement doctrine--the right of Indian tribes, within their

territory, to choose their own path guided by their own culture and values.

The freedom of an Indian tribe to choose a uniquely Indian path requires that the tribe itself be preserved and that it have an effective means of making and implementing choices about the use of reservation lands and resources. Strong tribal governments are essential to this end. The ability to preserve a tribal land base is critically important to the maintenance of tribal self-government and meaningful tribal relations. The truth of this statement was tragically and dramatically demonstrated by the effects of the allotment system.

As discussed previously,¹¹ the one of the purposes of the allotment system was to break up tribal relations and tribal ownership of land. The system almost succeeded in that purpose. By 1934, when the Indian Reorganization Act brought a halt to further allotments, Indian tribes had lost almost two-thirds of the land they had held in 1887. *Yakima*, 502 U.S. at 255-56 (1992).

To see just how closely the erosion of tribal land base and the erosion of tribal sovereignty continue to be linked, one only need consider the recent decisions of this Court that deal with tribal government jurisdiction over lands lost during the allotment period. These decisions illustrate that tribal government jurisdiction is increasingly defined by tribal land ownership. For example, in *Montana*, 450 U.S. at 559-66, the Court held that the Crow Tribe could not regulate hunting and fishing by non-members of the tribe on lands inside the reservation that were owned in fee by non-Indians. The Court based this conclusion squarely on the fact that the tribe no longer had "absolute and undisturbed use and occupation" of these formerly tribal lands because they had been allotted and alienated "as a result of the passage of the GAA . . . and the Crow Allotment Act of 1920" *Id.* at 559 (internal references omitted). See also *South Dakota v. Bourland*, 508 U.S. 679, 689 (1993) (conveying ownership "implies the loss of regulatory jurisdiction over the use of the land by others"); *State v. A-1 Contractors*, _____ U.S.

¹¹ *supra* n. 5.

_____, 117 S.Ct. 1404 (1997) (tribal court lacks jurisdiction over civil lawsuit against non-Indians for cause of action arising on non-Indian land); *Brendale v. Yakima Indian Nation*, 492 U.S. 408 (1989) (Yakima Nation could not regulate the use of land owned by non-Indians inside the "open" portion of the reservation (i.e., that part of the reservation where the majority of the land had passed into non-Indian ownership by virtue of the allotment system)).

Given the significance the Court has accorded to land ownership in its recent tribal sovereignty decisions, it is plain that the impact of tribal land losses caused by the policies of the allotment period did not end with the repudiation of those policies in 1934. Tribal land continues to justify and support tribal sovereignty, while the erosion of the tribal land base frequently leads to erosion of tribal sovereignty. The threat of dispossession is an inherent and inextricable part of the state real estate tax system. To the extent that a tribe's efforts to reacquire land are inhibited by state taxation or tribal lands are taken through tax forfeiture, serious infringement on tribal self-government will necessarily occur. This infringement cannot be justified by implication.

State taxation of tribal lands also is a serious infringement on the tribal right of self-determination and welfare of the tribe because it determines who chooses how the land is used. In addition to supporting tribal governmental jurisdiction, land is a major asset for tribes, an asset that can be used to support economic and social development that is driven by Indian, rather than non-Indian, needs and priorities. The various protections against alienation enjoyed by Indian lands, including their immunity from taxation, have the net effect of preserving Indians' freedom to choose the way in which this fundamentally important asset will be used, and toward what ends.

Professor Robert Clinton argues persuasively that these protections have the impact of removing "tribal land from the American marketplace." Robert Clinton, *Isolated in Their Own Country: A Defense of Indian Autonomy and Self Government*,

33 Stanford L. Rev. 979, 1045 (1981). As he explains, this has particular relevance in the property tax context:

The federally protected immunity from state real estate taxes helps ensure that Indian property resources remain insulated from the values and priorities set by the non-Indian market. Real estate taxes are generally assessed as a percentage of fair market value. The assessment of fair market value, while complex, obviously involves an evaluation of the manner in which the non-Indian market would value the property, which in part turns on the highest and best use to which the property could be subjected Thus, the state real property tax structures tend to encourage owners to put their property to the most productive uses the property will bear in order to pay the higher taxes on more valuable land. Since productivity of a parcel turns on demand factors which are influenced by cultural priorities, subjecting Indian land to state taxation tends to impose non-Indian economic values on the tribal land use decision, often to the detriment of Indians

Id. at 1045-46. For example, the Band may wish to preserve a grove of ancient pines for spiritual reasons, but the economic pressure of real estate taxes based on current high timber prices could force the Band to sell the timber to pay the taxes. Property tax considerations might similarly limit the Band's ability to deliver free or subsidized government services such as water, sewer, housing and medical care.

This obviously threatens tribal self-government and tribal welfare. The right of self-government must include the freedom of Indian tribes to make choices about how their economies and their communities will be ordered and run that may be different from the choices made by the states in which they are located.

The threats posed by county taxation are not theoretical. They were realized during the allotment period, and they are still

being realized today as the "train of evil consequences"¹² set in motion by the allotment system continues to unfold in the courts. Recently, one tribal sovereignty scholar made this direct connection between the loss of tribal land under the allotment system and the weakening of tribal self-government:

Allotment had devastating effects because of its near destruction of the Indian land base Destruction of the tribal land base in turn contributed to the destruction of tribal identity and self-government on a number of reservations.

A. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U Pitt. L. Rev. 1, 75-76 (1993).

In summary, state or county taxation infringes on the right of Indian tribes to govern themselves and develop their own economies. It does this by undermining the integrity of the tribal land base and the freedom of tribes to make their own choices about how best to use that land base. These threats are the reason the federal government and courts have given tribes protections that can only be overcome with the most explicit congressional language. Implied intent does not meet this test.

C. Implied State Tax Jurisdiction Over Tribal Land Is Contrary To Express Congressional Policies Contained In The Indian Reorganization Act And Therefore Violates Congressional Intent.

Since tribes were predicted to decline and disappear under the "mighty pulverizing engine"¹³ of the allotment system, Congress had no need to express any intent with regard to land

¹² Comm'n. Ind. Aff., 1934 Ann. Rep., extract reprinted in *Documents of United States Indian Policy* 225, (Francis Paul Prucha ed., 2d ed. 1990).

¹³ The description is President Theodore Roosevelt's. 35. Cong. Rec. 90 (1906).

that might eventually make its way into tribal hands--so it expressed no intent. The lack of any intent in various parts of allotment acts (like §§ 4, 5, and 6 of the Nelson Act) falls far short of the requirement of unmistakably clear intent.

Current federal Indian policy suffers from no such uncertainty. By enacting the Indian Reorganization Act ("IRA") of 1934, Congress clearly repudiated the policies of the allotment era, and the assumptions underlying them. Commissioner of Indian Affairs John Collier, architect of much of the IRA, stated upon its passage: "One becomes a little breathless, when one realizes that the Allotment Law--the agony and ruin of the Indians--has been repealed."¹⁴ Another commentator has characterized the IRA as "the death of . . . assimilationism" and its "primary objective" as being "not merely the termination of the allotment policy, but the restoration of the Indian tribe."¹⁵

The IRA created new policies, which continue in effect today, and which should inform this Court's interpretation of congressional intent. See *Bryan v. Itasca County*, 426 U.S. 373, 386 (1976); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 472-75 (1976). These new policies not only repudiated allotment era assumptions; they also expressed dramatically different congressional intent. This intent is to rebuild and protect tribal governments along with the land that supports them, and to encourage tribal independence--an intent that should act to prevent state jurisdiction over tribal government assets and operations in all but the most extraordinary circumstances.

Noted historian Francis Paul Prucha summarized many of the IRA's provisions as follows:

¹⁴ Quoted in Francis Paul Prucha, *The Great Father: The United States Government and the American Indian*, 962 (1984).

¹⁵ Yuanchung Lee, *Rediscovering the Constitutional Lineage of Federal Indian Law*, 27 New Mexico L. Rev. 273, 319 and 321 (1997).

The first sections dealt with land: further allotment was prohibited, existing trust periods and restriction on alienation for Indian land were indefinitely extended, remaining surplus lands could be restored to tribal ownership by the secretary of the interior, individual allotments could be voluntarily transferred to tribal ownership, and the secretary was authorized to acquire additional lands for reservations

The law granted any Indian tribe the right to organize for its common welfare and to adopt appropriate constitution and bylaws, to be ratified by a majority vote of adult members of the tribe. Such an organized tribe would have powers to employ legal counsel, to prevent the sale or other disposition of tribal assets, and to negotiate with federal, state, and local governments.

Francis Paul Prucha, *The Great Father: The United States Government and the American Indians* 962-63 (1984).

The policy implications of the IRA were dramatically stated by Indian Affairs Commissioner John Collier in his 1934 Annual Report:

The allotment system with its train of evil consequences was definitely abandoned as the backbone of the national Indian policy when Congress adopted and the President approved the Wheeler-Howard bill. *The first section of this act in effect repeals the GAA of 1887.* During numerous committee hearings, during several redrafts and modifications affecting every other part of the measure, this first section was never questioned or revised. It reached the President's desk in its original form without the change of a word or a comma, indicating that Congress was thoroughly convinced of the allotment system's complete failure and was eager to abandon it as the governing policy.

The Wheeler-Howard Act . . . also endeavors to provide the means, statutory and financial, to repair as far as possible, the incalculable damage done by the allotment policy and its corollaries.

Comm'r. Ind. Aff., 1934 Ann. Rep., *supra* n. 12 (emphasis added).

Rebuilding the tribal land base by the purchase and return of land within reservations was one of the primary remedial strategies recommended by Collier and adopted in the IRA.¹⁶ The strengthened tribal land base was to be the foundation of new tribal governments, and presumably it would be protected from the kind of erosion that marked the allotment era.

Although this Court has said that the IRA did not formally repeal all allotment era statutes (*see Yakima*, 502 U.S. at 262), there is no doubt that it repudiated the assumptions of the GAA and the allotment era, and halted future use of those assumptions. In that respect, the IRA and more recent congressional legislation certainly should be used to help resolve ambiguities in allotment era legislation—an approach endorsed by this Court in *Bryan v. Itasca County*, 426 U.S. 373 (1976). The Court noted, in interpreting ambiguities in Public Law 280¹⁷, that:

We are not obliged in ambiguous circumstances to strain to implement [an assimilationist] policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship.

¹⁶ See S. Rep. No. 1080, 73d Cong., 2d Sess. 2 (1934); Judith V. Royster, *The Legacy of Allotment*, 27 Ariz. S.L.J. 1, 15-17 (1995) (Professor Royster also discusses in this article the failure of the judiciary to take the IRA into account when interpreting allotment era legislation.); Cohen at 147; Prucha, *The Great Father*, *supra* p. 28 at 954-63;

¹⁷ 67 Stat. 588 (1953), codified as amended at 18 U.S.C. § 1162 and 28 U.S.C. § 1360 (1984).

Id. at 389 n. 14.¹⁸

The IRA's repudiation of the allotment system and allotment era policies should inform this Court's analysis of what is or is not unmistakably clear in the Nelson Act and other allotment legislation. Like the canons of construction, congressional repudiation of the allotment system and allotment era policies requires that ambiguities in the Nelson Act and related legislation be resolved in favor of tribal independence and the protection of tribal assets from state control, and that detrimental implications not be interpreted as express and unmistakably clear congressional grants of jurisdiction.

D. Implied State Tax Jurisdiction Over Tribal Land Is Contrary To Congressional Policy As Expressed In Recent Acts Of Congress And Therefore Violates Congressional Intent.

Since the passage of the IRA in 1934 (with a brief period of backsliding in the 1950's which generated Public Law 280), Congress and successive presidents have built on the IRA's foundation a framework of law and policy that supports tribal

¹⁸ *Bryan*, another case in which a Minnesota county attempted to collect taxes within the Leech Lake Reservation, is also relevant to the question of whether taxing authority can rest on an implication. In *Bryan*, Itasca County argued that the expansive congressional language in Public Law 280 gave it jurisdiction to tax the freely alienable personal property of an Indian within the Reservation. The *Bryan* decision, however, required even more explicit language in order to justify a state jurisdictional intrusion into Indian country. The decision considered the dangers posed to tribal governments by the county's interpretation, noted the current federal policy favoring tribal independence, and refused to "strain" to implement policies now rejected. The congressional language in the current appeal is more ambiguous than that considered in *Bryan*, Cass County's argument relies much more heavily on implication, and the allotment era policies have been rejected much more thoroughly and for a much longer time than the termination policies involved in *Bryan*. See Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harvard L. Rev. 381, 429-32 (1993).

independence and self-government within the protective framework of the federal trust responsibility for Indians. See *Yakima*, 502 U.S. at 255 (1992) (passage of IRA marked return "to principles of tribal self-determination and self-government"); *Santa Rosa Band Of Indians v. Kings County*, 532 F.2d, 655, 663 (9th Cir. 1975) ("The assimilation policy reflected in P.L. 280 was to a great extent a failure . . . , and has been discarded in favor of policies fostering Indian autonomy, reservation self-government and economic development."); *California v. Cabazon Band of Mission Indians*, 480 U.S. 164, 172 (1987) (Indian self-sufficiency and economic development are the overriding goals of Congress); *Iowa Mutual v. LaPlante*, 480 U.S. 9, 14-15 (1987) (noting federal policy favoring tribal self-government).

The body of federal laws and policies that promote tribal self-government and self-sufficiency is too large to discuss in detail here¹⁹, but a few highlights suffice to prove the point. In one of its most recent enactments on Indian affairs Congress expressly declared that "the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government," and further that "Congress through statutes, treaties and the exercise of administrative authorities, has recognized the self-determination, self-reliance, and inherent sovereignty of Indian

¹⁹ See, e.g., the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450a(b) (1995) (declaring Congressional "commitment to...the establishment of a meaningful Indian self-determination policy"); Indian Financing Act of 1974, 25 U.S.C. § 1451 (1995) (promoting tribal responsibility "for the utilization and management of their own resources"); Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 (1995) (granting exclusive jurisdiction over Indian child custody to tribal courts); Tribal Self-Governance Demonstration Project Act of 1991, 25 U.S.C. § 450f (1995) (amending the Indian Self-Determination Act to provide devolution of federal program responsibilities and federal funding to several tribal governments); and Clean Air Act Amendments of 1991, 42 U.S.C. § 7602 (1995) (authorizing tribal governments to be treated as states for the purposes of adopting reservation air quality standards).

tribes." Indian Tribal Justice Act, Pub. L. 103-176, § 2, Dec. 3, 1993, 107 Stat. 2004, codified at 25 U.S.C. § 3601 (1997). All Presidents since Lyndon Johnson have been guided by similar policies. President Nixon's Special Message to the Congress on Indian Affairs of July 8, 1970, which recommended the formal end to the policy of termination, expressed what has come to be the clear and consistent policy of the Federal Government toward Indian tribes—promoting tribal self-government while preserving and carrying out its trust responsibilities. Pub. Papers 564, 565-66 (1970). President Carter expressed it this way in his 1979 State of the Union Address:

The Federal government has a special responsibility to native Americans My administration . . . will ensure that the trust relationship and self-determination principals will continue to guide Indian policy.

Pub. Papers 121, 144 (1979). This policy remains in force today. See William J. Clinton, *Memorandum on Government-to-Government Relations with Native American Tribal Governments*, 30 Weekly Comp. Pres. Doc. 936 (May 2, 1994).

Cass County's rule of implied state tax jurisdiction flies in the face of an enormous amount of express congressional and executive branch policy extending from the passage of the IRA to the present day. The Court should not strain to adopt this rule in the face of such overwhelming policy directives to the contrary.

E. Implied State Tax Jurisdiction Over Tribal Land Is Contrary To The Canons Of Construction Of Federal Statutes Dealing With Indians And Therefore Should Be Rejected.

The County's proposed rule of implied taxability based on alienability cannot be squared with the canons of construction used by this Court for well over one hundred years. Because of the unique status of Indian tribes in American law, and the federal government's trust responsibilities with respect to them, special

canons of construction have been applied to any case in which tribal rights and interests are at issue.

Professor Philip P. Frickey, in a scholarly analysis of the evolution of Indian law doctrine, summarized the effect of the canons in this way:

Properly understood, the canons call upon the judge to become sensitized to the Indian interests in the case, to conceptualize a tribe as a distinct and sovereign political community under American domestic law, to reexamine the fit between routine Euro-American legal doctrines and the tribal context, to recognize a tradition of protection of Indian rights against all but crystal-clear encroachments, and to abandon obsolete congressional intent if later developments have a repudiated it.

Philip P. Frickey, *supra* n. 18 at 418 n. 158.

The canons of construction are well known to this Court and have been used often in cases past and present.²⁰ The canons, and the concepts summarized by Professor Frickey, will not permit the County's arguments in this appeal. The County's proposed rule—supported by implication—cannot survive the canons and their underlying rationale.

²⁰ The common formulations of the canons are: (1) that tribal governmental rights will not be abrogated absent plain and unambiguous statutory or treaty language (*see, e.g., County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247-48 (1985) *reh. denied* 471 U.S. 1062 (1985)); (2) that ambiguities in statutes or treaties must be resolved in favor of and for the protection of tribal governments (*see, e.g., Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176-77 (1989); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985); *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976); *Choate v. Trapp*, 224 U.S. 665, 675 (1912)); and (3) that statutes must be liberally construed in their application to Indian tribes in order to achieve the protective purposes of federal Indian policy (*see, e.g., Tulee v. Washington*, 315 U.S. 681, 684-85 (1942)).

F. The *Yakima* Opinion Did Not Abolish the Unmistakably Clear Intent Rule and Substitute A New Rule Equating Alienability With Taxability.

1. The Court Of Appeals Correctly Rejected Cass County's Strained Reading Of *Yakima* And Correctly Interpreted The Decision As Requiring A Detailed Examination Of Statutory Language And Intent.

Cass County seeks to use this Court's decision in *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251 (1992), to provide support for its proposed alienability equals taxability rule. However, as the court of appeals in its detailed opinion recognized, the analytical framework of the *Yakima* decision simply is not consistent with such a rule.²¹ There are four main reasons, all identified by the court of appeals, why the County's reading of *Yakima* is erroneous.

The first fallacy is identified by the court of appeals at 108 F.3d at 825 (Pet. App. at 12):

[A]s the County concedes, its reading conflicts with the *Yakima* opinion itself and with Supreme Court precedent requiring Congress to provide unmistakably clear intent before allowing state taxation of Indians or their property.

In other words, the County concedes that alienability only *implies* taxability, and an implication by definition is not something that is "unmistakably clear."²² The Sixth Circuit has reached precisely

²¹ The County's interpretation essentially is a repetition of the rationale used in *Lummi Indian Tribe v. Whatcom County, Washington*, 5 F.3d 1355 (9th Cir. 1993), *cert. denied*, 512 U.S. 1228 (1994). Both *Lummi's* and the County's rationale is flawed for the reasons identified by the Eighth Circuit Court of Appeals and as further discussed in this brief.

²² Webster's New Universal Unabridged Dictionary (2d ed. 1979), defines "imply" as "to indicate without saying openly or directly; to hint;

the same conclusion, as has the United States District Court for the District of Colorado. *United States Ex rel Saginaw Chippewa Tribe v. Michigan*, 106 F.3d 130, 133 (6th Cir. 1997); *Southern Ute Indian Tribe v. Bd. of County Commissioners of LaPlata County*, 855 F. Supp. 1194, 1200 (D. Colo. 1994) *vacated on ripeness grounds*, 61 F.3d 916 (10th Cir. 1995). The County's brief to this Court repeats the concession: "The issue in this case is whether Congress...gave its *implicit* permission to tax those lands notwithstanding the absence of express statutory language to that effect. Brief for Pet. at 11 (emphasis added).

The second fallacy, also identified by the court of appeals, is that the County ignores *Yakima's* repeated emphasis on the § 6 Burke Act proviso of 1906 as providing the confirming proof of

congressional intent that may have been implied in the alienability provisions of § 5. [I]n order to support its argument, the County must read *Yakima* as resting its conclusion solely on the effect of the alienability section of the GAA. This reading disregards the significance given by the Court to the language of § 6 of the GAA. It repeatedly pointed to the Burke Act proviso in § 6 as the primary source of clear congressional intent to allow the ad valorem tax levied by Yakima County.

108 F.3d at 825 (Pet. App. at 12-13). The *Yakima* opinion spent a great deal of time analyzing the meaning of the Burke Act proviso, which is the only part of either § 5 or § 6 of the GAA that specifically refers to removing restrictions on taxation. If alienability by itself were a sufficient indication of unmistakably clear intent, the time spent on the Burke Act and § 6 would have been unnecessary. The opinion could simply have announced at the beginning that alienability equals taxability and have stopped there. Again, the Sixth Circuit reached a similar conclusion.

suggest; intimate" It tortures the language to equate "imply" with making something "unmistakably clear."

Saginaw, 106 F.3d at 133 ("The *Yakima* court relied on this explicit taxation language [in § 6] throughout its opinion")

The third fallacy of the County's reading of *Yakima* is that it is unreconcilable with Part III of the opinion, which allowed the ad valorem property tax but prohibited the excise tax on land sales. Again, the court of appeals correctly analyzed the issue:

If alienability always equals taxability, it should be the nature of the property right, not the nature of the tax, that matters. If that were the rule, the Court should have upheld both the ad valorem and the excise taxes levied by the County since the land was made alienable by the GAA. Instead, the Court refused to uphold the excise tax because it found that the language of the Burke Act proviso could not justify the imposition of such a tax Under the County's reading of *Yakima*, section III of the opinion would be superfluous and the Court would have reached a different result.

108 F.3d at 826 (Pet. App. at 13). See also *Saginaw*, 106 F.3d at 134. The detailed analysis of the Burke Act language in the Part III *Yakima* analysis again demonstrates that the applicable analytical approach in cases like these is a detailed statutory and historical analysis, and not reliance on a vastly oversimplified but easily stated rule.

The fourth significant fallacy in the County's reading of *Yakima* is that it ignores the significance this Court's order for remand. The court of appeals accurately pointed out:

That remand left open the question of whether land allotted under a different act might be taxed or not. If alienability equaled taxability it should not have mattered under which act the land was made alienable--the mere fact of alienability should have been enough to allow state taxation.

108 F.3d at 826 (Pet. App. at 14). See also *Southern Ute*, 855 F. Supp. at 1200. ("if alienability were the only test, the court would not have left open the question in *Yakima* whether patenting under an act other than the General Allotment Act would require a different result"). The *Yakima* remand makes no sense if the sweeping new rule advocated by the County were intended by this Court.

Cass County has misread the approach, analysis, and end result of the *Yakima* opinion. It had to do so in order to justify its taxation of pine lands and homestead lands now owned by the Leech Lake tribal government. However, *Yakima* should provide no help to the County. *Yakima's* approach was careful, detailed, and followed strong precedent in the field of Indian taxation. The County's re-casting of the decision should not be accepted.

2. The Court Of Appeals Correctly Concluded That The *Goudy* Decision Does Not Require A Rule Equating Alienability With Taxability.

A recurring argument of Cass County is that the 1906 opinion of the Supreme Court in *Goudy v. Meath*, 203 U.S. 146 (1906) sets forth the rule that alienability equals taxability. However, that is not what the *Goudy* opinion concluded, and that is not what the *Yakima* opinion said it concluded. Alienability in *Goudy* was, as the court of appeals here put it, a "contributing factor," 108 F.3d at 828 n. 10, to the conclusion that the land in that case was taxable, but it was not the only factor, and it was not sufficient by itself. The County extends the importance of *Goudy*, a relatively minor, fact-specific opinion, far beyond its actual reach.

Several factors were important in the *Goudy* decision. Among the most important was that Goudy himself was considered to be, not an Indian, but a "citizen of the United States." The Washington Supreme Court considered him to be a citizen because "he has entirely severed his tribal relations, and is a citizen of the United States, with all the privileges and immunities of any other citizen." *Goudy v. Meath*, 38 Wash. 126,

127, 80 P. 295, 296 (1905). The Washington Supreme Court referred to Goudy as "formerly a member of the Puyallup tribe." The Supreme Court also considered him to be a citizen because of the additional language of § 6 of the GAA:

One of the facts agreed upon is the following:

"That since the issuance of said patent, and by an act of Congress passed and approved on the 8th day of February, 1887, plaintiff became and now is a citizen of the United States, and entitled to all the rights, privileges, and immunities of such citizens."

Goudy, 203 U.S. at 147, quoting the agreed statement of facts submitted by the parties to the state courts. This was a significant factor because by abandoning tribal relations and becoming a "citizen", Goudy had lost his rights to his inherent immunities as an Indian—including his right to be free of state taxation absent congressional approval.²³

Once Goudy became a "citizen", the normal taxation rules applied to him, which meant that without an exemption he and his property were taxable. His only arguable exemption was in his property document, the land patent, which restricted the land's alienability. The restrictions on his patent were separate property law protections and were his regardless of whether he was an Indian. When the restrictions on his land were released in 1903, Goudy had nothing left to protect him from taxation. His jurisdictional ("political") protection was no longer available because he was considered by the court to be a "citizen" and not an "Indian", and his patent no longer protected him because its

²³ This was the law the time of *Goudy*: if an Indian became a citizen, then he lost his "political" protection as an Indian. See *In re Heff*, 197 U.S. 488 (1905). Some years after *Goudy*, the Supreme Court overruled the conclusion of the Court in *Heff* that one could not be a citizen and also have the federal protection that was given to Indians. See *United States v. Nice*, 241 U.S. 591 (1916).

time restriction had expired.²⁴ "Alienability" did not remove the jurisdictional bar against state taxation--that bar was removed by citizenship. Another important factor in the *Goudy* decision was the following provision of *Goudy's* patent, quoted in the opinion of the Supreme Court of Washington:

[T]hat the United States . . . has given and granted . . . the tracts of land above described, but with the stipulation . . . that the said tracts shall not be alienated or leased for a longer period than two years and shall be exempt from levy, sale, or forfeiture, which provisions shall continue in force until a state constitution embracing such lands within its boundaries shall have been formed and the legislature of the state shall remove the restrictions, and no state legislature shall

²⁴ Justice Brewer, who authored the *Goudy* opinion, believed that "citizenship" removed an Indian from the federal jurisdictional protections against state action. Brewer was also the author of *In re Heff*, 197 U.S. 488 (1905), decided one year before *Goudy*. (*In re Heff* was the decision finding that allottees became subject to state laws immediately upon receiving a trust patent.) In *Heff*, Justice Brewer repeatedly used the § 6 GAA grant of citizenship (and corresponding declaration that allottees shall be subject to the laws of the states) as the rationale for ending federal jurisdictional protection of Indians:

We do not doubt . . . that John Butler, at the time the defendant sold him the liquor, was a citizen of the United States and of the state of Kansas, having the benefit of, and being subject to, the laws, both civil and criminal, of that state.

Heff, 197 U.S. at 505. When read together, *Heff* and *Goudy* show that Justice Brewer felt that *Goudy's* status as a citizen took away the jurisdictional protections given him by virtue of his political status, and left him only with his patent conditions which expired in 1903. See, e.g., Justice Brewer's statement in *Heff*, 197 U.S. at 509:

But the fact that property is held subject to a condition against alienation does not affect the civil or political status of the holder of the title.

remove the restrictions without the consent of Congress."

Goudy, 38 Wash. at 127-28, 80 P. at 296 (emphasis added). In 1889 the State of Washington adopted a constitution, and in 1890 the state legislature passed an act which stated that any Indians holding lands in severalty would have all restrictions relating to them and the land removed, and that the Indian landowners would be treated just as any other non-Indian person. The Secretary of the Interior declared that Congressional consent to the state law was granted as of 1903, and the state law was in effect when *Goudy* brought his lawsuit. See *Goudy*, 38 Wash. at 129, 80 P. at 296.

The state law removed all restrictions on the land and recognized the power of the allottee to "incumber" and "alien" the land just as other citizens. The existence of this complicated combination of patent language and state legislation also undoubtedly influenced the *Goudy* court's decision.

It is important to understand that the *Goudy* court also performed an analysis similar to that performed by the *Yakima* court. It certainly believed that by making land alienable there was an implication of intent to allow taxation (the same implication that existed in § 5 of the GAA). However, even the *Goudy* court looked for more. Among other places, it found the additional evidence it needed in § 6 of the GAA:

But further, by the act of February 8, 1887, plaintiff became and is a citizen of the United States. That act, in addition to the grant of citizenship, provided that 'Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside. Matter of *Heff*, 197 U.S. 488.

Among the laws to which the plaintiff as a citizen became subject were those in respect to taxation.

Goudy, 203 U.S. at 149. Hence, the *Goudy* opinion looked for additional indications of intent beyond the mere fact of alienability. It found such additional indications in the § 6 citizenship provisions of the GAA, in the Washington state legislation contemplated in the patent itself, and in *Goudy's* renunciation of his tribal relations--which removed him from the special jurisdictional protections given to Indians. In short, the Court in *Goudy* performed the same kind of historical and legislative analysis as in *Yakima*. It did not simply set out a new rule at the beginning of its opinion that any time land is alienable by an Indian it is taxable by the state.

The final indication of Cass County's misreading of the *Goudy* decision is the subsequent history of that decision. In all the years since *Goudy*, the Supreme Court has continued to apply the "per se" rule against Indian taxation. It has always rejected the assertion of state taxing authority over Indians on reservations when that authority was not based on an unmistakably clear congressional delegation.²⁵ Most of these cases involved property that clearly was freely alienable.²⁶ No subsequent case has articulated the overly simplistic rule for which the County cites *Goudy* as authority. That is because *Goudy* did not reformulate Indian tax principles in the manner the County wishes it had. Instead, *Goudy* did what courts throughout the years have done, and what this Court did in *Yakima*--it engaged in a detailed analysis of legislation and history in search of an unmistakably clear indication of congressional intent.

²⁵ See cases and argument *supra* pp. 7-11.

²⁶ E.g., motor homes (*Bryan v. Itasca County*, 426 U.S. 373 (1976)); automobiles (*Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976)); tobacco products (*Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134 (1980)); and money (*McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. 164 (1973)).

V. EVEN IF ALIENABILITY DETERMINES TAXABILITY, TRIBAL FEE LAND CANNOT BE TAXED BECAUSE THE INDIAN NONINTERCOURSE ACT RENDERS IT INALIENABLE.

A. The Plain Language Of The Indian Nonintercourse Act Protects All Tribal Lands From Alienation Without The Consent Of The United States.

Indian Tribes enjoy an additional protection for their lands not shared by individual Indian landowners--the comprehensive restraint on alienation imposed by the Indian Nonintercourse Act, 25 U.S.C. § 177 (hereafter "INA" or § 177").²⁷ So far as relevant, § 177 provides:

No purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

²⁷ The ancestor of 25 U.S.C. § 177 was the Trade and Intercourse Act of 1790 (Act of July 22, 1790, ch. 33, § 4, 1 Stat. 137), a temporary measure renewed in 1793, 1796 and 1799. The first permanent Trade and Intercourse Act was enacted in 1802 (Act of March 30, 1802, ch. 13, 2 Stat. 139). The 1802 act, as amended, became the basis for the Trade and Intercourse Act of 1834 (Act of June 30, 1834, ch. 161, § 12, 4 Stat. 730), which, in turn, is the source of 25 U.S.C. § 177. Prior to the 1834, amendments the INA applied to purchases or grants of land from "any Indians or nation or tribe of Indians." See, e.g., Section 4 of the 1790 Act. In 1834, however, Congress restricted the scope of the restraint to "any Indian nation or tribe of Indians." Act of June 30, 1834, ch. 161, § 12, 4 Stat. 161. See *Catawba Indian Tribe of South Carolina v. South Carolina*, 718 F.2d 1291, 1299 (4th Cir. 1983). ("Henceforth the Nonintercourse Act afforded protections only to the land of Indian tribes.") The lands at issue in this appeal obviously are owned by a "tribe of Indians."

The meaning of this language is as plain and unambiguous as it is inclusive.²⁸ It expressly includes "any title or claim" to Indian tribal lands. As the Attorney General of the United States noted in an 1885 opinion:

[T]his statutory provision is very general and comprehensive. Its operation does not depend upon the nature or extent of the title to the land which the tribe or nation may hold. Whether such title be fee simple, or a right of occupancy merely, is not material; in either case the statute applies.

18 Op. Att'y Gen. 235, 237 (1885). This is the plain meaning of the phrase "any title or claim."²⁹ Had Congress intended to limit the application of the INA to the right of occupancy usually referred to as "Indian title," to "treaty title" or to any of the other

²⁸ It is an elementary and frequently cited rule of construction that when a statute is to be interpreted, "the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." *Estate of Cowart v. Nicklos Drilling Company*, 505 U.S. 469, 475 (1992). *Accord Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993); *United States v. Turkette*, 452 U.S. 576, 580 (1981). Each term of the statute must be construed "in accordance with its ordinary or natural meaning." *F.D.I.C. v. Meyer*, 510 U.S. 471 (1994). *Accord United States v. Alvarez-Sanchez*, 511 U.S. 350, 357 (1994).

²⁹ Courts have consistently recognized and applied the plain meaning of the words of § 177. See, e.g., *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 388 F. Supp. 649, 660 (D. Maine 1975) ("The Court holds that the Nonintercourse Act is to be construed as its plain meaning dictates and applies to the Passamaquoddy Indian Tribe."); *Mohegan Tribe v. Connecticut*, 638 F.2d 612, 621 (2d Cir. 1980) ("The Nonintercourse Act, containing no language of limitation, must then be read as applying to all Indian lands."); *Cayuga Indian Nation of New York v. Cuomo*, 565 F. Supp. 1297, 1313 (N.D.N.Y. 1983) ("The language of the 1793 and 1802 Nonintercourse Acts reveals no ambiguity whatsoever as to their geographic scope."), *aff'd*, 528 F.2d 370 (1st Cir. 1975).

sources of tribal interests in land³⁰, it surely would have used a more precise term. Certainly, the concepts of "Indian title" and "treaty title" were commonly employed to describe tribal land tenure during the formative period of the INA. See *Flecher v. Peck*, 10 U.S. (6 Cranch) 87, 142 (1809); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 587-92 (1823).

The language also applies to all of these interests in land *however alienation occurs*, whether by "purchase, grant, lease or other conveyance." This must necessarily include forced sales for the benefit of creditors, including tax forfeitures. Cohen put it this way:

Another consequence of the restraints on alienation is the inability of states to transfer title by foreclosure sale in the process of enforcing mortgage obligations *or for non-payment of taxes*.

Cohen at 520 (emphasis added).

B. The Plain Meaning Of The Indian Nonintercourse Act Is Consistent With The Purpose Of The Act.

The "obvious purpose" of the INA "is to prevent unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties, except the United States, without the consent of Congress" *Federal Power Comm'n. v. Tuscarora Indian Nation*, 362 U.S. 99, 119, *reh. denied* 363 U.S. 956 (1960). Thus, the Act serves to preserve the tribal land base from erosion. In the context of current threats to Indian land, Cohen notes that § 177 continues to serve a vital purpose by protecting tribal lands from non-Indian market forces: "*If tribal land were not subject to restraints on alienation and tax*

³⁰ Cohen identifies "at least six ways" in which interests in land have been acquired by Indian tribes: " (1) by action of a prior government; (2) by aboriginal possession; (3) by treaty; (4) by act of Congress; (5) by executive action; or (6) by purchase." Cohen at 472.

immunities, market forces and state tax assessors would eventually erode Indian ownership of the reservation" Cohen at 509 (emphasis added). Cohen rejects the notion that this protection is "overly paternalistic" because

... a different justification has gradually emerged for the retention of the restraints. Federal policy makers increasingly view preservation of a substantial tribal land base as essential to the existence of tribal society and culture. As an historical matter, moreover, it can be argued persuasively that the early treaties represented a contractual undertaking by the United States to protect unceded lands in Indian ownership, as a zone where Indians could exercise at their option their culture and traditions with reduced interference from the mainstream society. To some extent a federal policy of continuing restraints on alienation of Indian lands represents congressional deference to principles of tribal self-determination.

*Id.*³¹

The INA protects tribal land base, tribal values, and tribal self-determination from the incursion of surrounding non-Indian communities and non-Indian economic forces. It is important enough to have been called "a cornerstone of the modern federal trusteeship over all Indian land." Robert N. Clinton and Margaret Tobey Hotopp, *Judicial Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 Maine L. Rev. 17, 19 (1979).

³¹ This is not so much a "different interpretation" as an application of the purpose of the INA to current conditions. Speaking of the terms of § 177, the court in *Cayuga Indian Nation of New York v. Cuomo*, 565 F. Supp. 1297, 1326 (N.D.N.Y. 1983) said, "[I]t is a cardinal rule of construction that a statute framed in general terms embraces conditions arising in the future not known at the time of enactment. *DeLima v. Bidwell*, 182 U.S. 1, 197 (1900); *United States v. Browder*, 113 F.2d 97, 99 (2d Cir. 1940)."

Given this purpose, there is no logical basis for distinguishing between Indian lands for INA purposes based on the kind of title held by an Indian tribe--any loss of land regardless of how a tribe acquired it is equally incompatible with the congressional purpose of providing "maximum protection of Indian land." *Oneida Indian Nation of New York v. County of Oneida*, 719 F.2d 525, 534 (2d Cir. 1983), *aff'd in part, reversed in part on other grounds, sub nom. County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226, *reh. denied* 471 U.S. 1062 (1985) (holding that in enacting the INA Congress contemplated that Indians would have a private right of action to enforce it even though the Act did not expressly provide such a right). Based on similar reasoning and in light of the plain meaning of the statutory language, courts have consistently refused to narrow the reach of the INA. *See Mohegan Tribe v. Connecticut*, 638 F.2d 612, 621 (2d Cir.), *cert. denied*, 452 U.S. 968 (1981) (INA restraint on alienation meant to apply throughout the United States, not just in "Indian Country"); *Cayuga Indian Nation of New York v. Cuomo*, 565 F. Supp. 1297, 1312-15 (N.D.N.Y. 1983) (The INA applies to so-called "preemption states" such as New York); *Narragansett Tribe of Indians v. Southern R. I. Land Dev. Corp.*, 418 F. Supp. 797, 808-09 (D.R.I. 1976) (so-called "white settlement" exception to INA applies only to transactions by individual Indians living in white settlements, not to tribes); *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940, 950 (D. Mass. 1978), *aff'd on other grounds, sub nom. Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir. 1979) (following and expanding on *Narragansett*); *Mayes v. Cherokee Strip Livestock Ass'n*, 58 Kan. 712, ___, 51 P. 211, 216-17 (1897) (§ 177 applies to grazing leases).

C. Courts Have Consistently Construed The Plain Language Of The Indian Nonintercourse Act To Include Fee Lands.

In spite of the plain language of the Act and the repeated refusal of courts to limit its scope, the County will undoubtedly argue that tribal fee land is not protected by the INA. This argument is not supported by logic or precedent.

As noted above, there is no basis for granting or withholding the protections of the INA based on the nature of a tribe's interest in land or its source of title. The underlying purpose of the INA, namely to provide maximum protection to Indian land, is fulfilled whether the tribe has fee title, Indian title, treaty title, or any other interest in land or whether it has acquired its land by occupancy, grant, or purchase.

Overwhelmingly, courts that have considered this issue agree. Summarizing the current state of the law on this point, the United State Court of Appeals for the Fifth Circuit recently concluded, "The Nonintercourse Act protects a tribe's interest in land whether that interest is based on aboriginal right, purchase, or transfer from a state." *Tonkawa Tribe of Oklahoma v. Richards*, 75 F.3d 1039, 1045 (5th Cir. 1996) (citations omitted).³²

The line of cases cited in *Tonkawa* can be traced back to 1913 when the United States Supreme Court decided that federal Indian legislation applied to lands held in fee simple by the New Mexico Pueblos just as it did to fee lands owned by the Five

³² In their article discussing § 177's restraints on alienation, Clinton and Hotopp reach the same conclusion:

The statute [§177] by its terms applies to any conveyance of Indian land or any title or claim thereto. It is generally understood that the sweeping scope of the Act includes all lands occupied by an Indian tribe irrespective of when or how the lands were acquired. Furthermore, the statute generally covers any sort of conveyance or alienation of an interest in real property.

Clinton and Hotopp, *supra* p. 44 at 69 (emphasis added).

Civilized Tribes, which implied that § 177 would apply to these lands. *United States v. Sandoval*, 231 U.S. 28 (1913) (specifically dealing with laws prohibiting the introduction of intoxicating liquor into Indian country). This Court's decision in *United States v. Candelaria*, 271 U.S. 432 (1926) removed any doubt on this point by holding expressly that the INA applies to Pueblo lands even though they are held by fee simple title. This Court similarly assumed in *Federal Power Comm'n. v. Tuscarora Indian Nation*, 362 U.S. 99, 118-21 (1960) *reh denied*, 363 U.S. 956 (1960) that the INA applies to tribal lands, whether or not they are held in fee simple.

Lower federal courts over many years also have held § 177 applicable to tribal fee lands. See, e.g., *United States v. 7.405.3 Acres of Land*, 97 F.2d 417, 422 (4th Cir. 1938) ("[I]t makes no difference that title to the land in controversy was originally obtained by grant from the state of North Carolina, or that the Indians are citizens of that state and subject to its laws."); *Alonzo v. United States*, 249 F.2d 189, 196 (10th Cir. 1957) *cert. denied*, 355 U.S. 940 (INA protects grants made by governments of Spain and Mexico and by purchase); *United States v. University of New Mexico*, 731 F.2d 703, 706 (10th Cir. 1984) ("[T]he Pueblos are entitled to the same protection as other tribes regardless of their fee simple title, and the intent of Congress to provide such protection cannot be doubted."); *Joint Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975) (INA protects grants by a state to a tribe); *Oneida Indian Nation v. County of Oneida*, 434 F. Supp 527, 538 (INA protects land reserved for tribe in treaty with New York prior to ratification of United States Constitution), *aff'd*, 719 F.2d 525 (2d Cir. 1983), *aff'd in part and rev'd in part on other grounds*, 470 U.S. 226 (1985).

Alonzo is particularly relevant here. There, the 10th Circuit Court of Appeals held unequivocally that "the restrictions against alienation apply to lands acquired by the Pueblo [of Laguna] through purchase, as well as to lands acquired in any other manner." *Alonzo v. United States*, 249 F.2d 189, 196 (10th Cir.

1957). The court based its interpretation of the INA squarely on the purpose of the Act:

[T]he reason for the imposition of the restrictions [contained in § 177] is in nowise related to the manner in which the Indians acquired their lands. The purpose of the restrictions is to protect the Indians . . . against the loss of their lands by improvident disposition or through overreaching by members of other races.

Id. That same reasoning supports the application of the INA to the Band's fee lands.

D. Congress Has Recognized That The Indian Nonintercourse Act Protects Fee Land.

Congress itself has recognized that § 177 restraints on alienation apply to and protect tribal fee land. It has done so, not just once, but on several occasions.

For example, 1960 Congress amended the Navajo-Hopi Rehabilitation Act of 1950, 25 U.S.C. § 635.³³ The amendment, among other things, expressly lifted § 177's restraints, and authorized the Navajo Tribe to dispose of its fee lands without federal approval. *See* P.L. 86-505, § 1, 74 Stat. 199, codified at 25 U.S.C. § 635(b) (1983). The legislative history of the law is significant because it demonstrates that Congress, too, considered § 177 applicable to tribal fee lands, and understood that it had to expressly lift § 177's restrictions in order to let the tribe alienate the property. In the words of the House Report on the bill that became the Navajo-Hopi Rehabilitation Act:

³³ It is well-established that a "later legislative act can be regarded as a legislative interpretation of an earlier act and 'is entitled to great weight in resolving ambiguities and doubts.'" *Wilson v. Marchington*, 127 F.3d 805, 809 (9th Cir. 1997), quoting *Erlenbaugh v. United States*, 409 U.S. 239, 243-44 (1972) and *United States v. Stewart*, 311 U.S. 60, 64-65 (1940).

The Navajo Tribe has acquired in recent years with its own funds approximately 100,000 acres in fee simple. Under the provisions of Revised Statutes 2116 (25 U.S.C. 177), it appears that no one can safely acquire these lands by purchase or otherwise without the consent of the United States. *Tuscarora Indian Nation v. Federal Power Commission*, 265 F.2d 338 (C.A., D.C. 1958); *Tuscarora Nation v. Power Authority of the State of New York*, 257 F.2d 885 (C.A.2, 1958). This, of course, operates as a limitation on the power of the tribe to dispose of them as it sees fit. The committee believes that this disability should be removed in the case of the Navajo Tribe and that it should be free to manage its free [sic] simple lands as it wishes.

H.R. Rep. No. 1648, 86th Cong., 2d Sess., 1960, *reprinted in* 1960 U.S.C.C.A.N. 2352.

Similarly, in Public Law 101-630, 104 Stat. 4531, passed in 1990, Congress expressly authorized the sale of a single parcel of land owned in fee simple by the Rumsey Indian Rancheria. Section 101(5) of that Act explained the need for the authorization: "Section 2116 of the Revised Statutes (25 U.S.C. 177) prohibits the conveyance of any lands owned by Indian tribes without the consent of Congress". The House Committee Report accompanying the Act reaffirmed that the Act was necessary because conveyance of lands owned by Indian tribes is prohibited without the consent of Congress. *See* H.R. Rep. No. 687, 101st Cong., 2d Sess., 1990. *See also* Pub. L. 101-379, 104 Stat. 473, § 11 of the Indian Law Enforcement Reform Act of 1990 (authorizing the Eastern Band of Cherokee Indians to convey its interest in a business known as Carolina Mirror, Inc., which included an interest in land, "notwithstanding any other provision of law"); Pub. L. 102-497, § 4, 106 Stat. 3255, (authorizing Mississippi Band of Choctaw Indians to convey its fee interest in lands acquired from National Disposal Systems, Inc. in Mississippi, "notwithstanding any other law", with the committee

report noting that "the Bureau of Indian Affairs cannot dispose of the property without Congressional approval." S. Rep. No. 428, 102 Cong., 2d Sess., 1992, *reprinted in* 1992 U.S.C.C.A.N. 2620); Pub. L. 103-435, § 4, 108 Stat. 4566, 4568-69 (authorizing sale of land owned by Ysleta Del Sur Pueblo "in accordance with" 25 U.S.C. 177); Pub. L. 102-575, § 503, 106 Stat. 4600 at 4652 (expressly exempting Ute Water rights settlement from the application of § 177); Pub. L. 103-116, § 13, 107 Stat. 1136 (authorizing the Catawba Indian Tribe of South Carolina to acquire lands outside its reservation and exempting such lands from § 177).

Thus, Congress frequently has recognized that it must expressly lift the restraints imposed by § 177 in order to make tribal fee land freely alienable. Since Congress has never exempted the Band's fee lands from the application of § 177, they are not freely alienable.

CONCLUSION

For the foregoing reasons, the decision of the Eighth Circuit Court of Appeals should be affirmed.

Dated: January 16, 1998

Respectfully submitted,

James M. Schoessler
Counsel of Record
Steven G. Thorne
Joseph F. Halloran
Jacobson, Buffalo, Schoessler
& Magnuson, Ltd.
Suite 810 Lumber Exchange Bldg.
10 South Fifth Street
Minneapolis, Minnesota 55402
(612) 339-2071

Counsel for Respondent

FEB 4 1998

In The
Supreme Court of the United States
October Term, 1997

CASS COUNTY, MINNESOTA; SHARON K.
ANDERSON, in her official capacity as Cass County
Auditor; MARGE L. DANIELS, in her official capacity
as Cass County Treasurer; STEVE KUHA, in his
official capacity as Cass County Assessor; JAMES
DEMGEN, in his official capacity as Cass County
Commissioner; GLEN WITHAM, in his official capacity
as Cass County Commissioner; ERWIN OSTLUND, in
his official capacity as Cass County Commissioner;
VIRGIL FOSTER, in his official capacity
as Cass County Commissioner,

Petitioners,

v.

LEECH LAKE BAND OF CHIPPEWA INDIANS,
Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Eighth Circuit**

REPLY BRIEF OF PETITIONERS

Office of Cass County
Attorney

EARL E. MAUS
Cass County Attorney
Counsel of Record
Cass County Courthouse
P.O. Box 3000
Walker, MN 56484
Telephone: (218) 547-7255
Counsel for Petitioners

Of Counsel:
MARK B. LEVINGER
JAMES W. NEHER
Assistant Attorneys General
State of Minnesota

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
ARGUMENT.....	1
I. CONGRESS HAS MADE UNMISTAKABLY CLEAR ITS INTENT THAT TAXABILITY OF TRIBAL FEE LAND IS A NECESSARY CONSEQUENCE OF ITS ALIENABILITY	1
A. The <i>Yakima</i> Decision Applied The Unmistakably Clear Intent Rule And Found It Satisfied By Implication.....	1
B. The <i>Goudy</i> Court Based Its Holding Of Taxability On The Alienability Of The Land In Question.....	2
C. Unless Expressly Provided Otherwise, Congress Has Consistently Linked The Free Alienability Of Indian Land Owned In Fee With Its Taxability.....	4
D. Enactment Of The Indian Reorganization Act Reaffirmed Congress' Intent To Link Alienability With Taxability.....	9
II. THE RULE THAT TAXABILITY OF TRIBAL LAND IS A NECESSARY CONSEQUENCE OF ITS ALIENABILITY DOES NOT UNDERMINE THE CONGRESSIONAL POLICY PROMOTING TRIBAL SELF-GOVERNANCE.....	10
A. The IRA Demonstrates The Consistency Between Cass County's Position In This Case And The Federal Government's Policy Of Tribal Self-Governance.....	10

TABLE OF CONTENTS - Continued

	Page
B. The <i>In Personam</i> Tax Cases Cited By The Band Are Inapposite To The Issue In This Case	12
C. The <i>In Personam</i> Regulatory Cases Cited By The Band Are Inapposite To The Issue In This Case.....	13
III. THE INDIAN NONINTERCOURSE ACT DOES NOT APPLY TO THE TRIBAL LANDS AT ISSUE IN THIS CASE.....	14
A. The Indian Nonintercourse Act Applies Only To Tribal Lands Which Have Never Been Made Alienable By Consent Of Congress.....	14
B. The Cases Cited By The Band Also Show That The INA Applies Only To Tribal Lands Which Have Never Been Made Alienable By Consent Of Congress.....	15
C. The Statutory Law Does Not Support The Band's Contention That The Tribal Lands At Issue In This Case Are Governed By The INA.....	19
CONCLUSION	20

TABLE OF AUTHORITIES

	Page
FEDERAL DECISIONS	
<i>Alonzo v. United States</i> , 249 F.2d 189 (10th Cir. 1957), <i>cert. denied</i> , 355 U.S. 940 (1958).....	17, 18
<i>Brendale v. Yakima Indian Nation</i> , 492 U.S. 408 (1989).....	13
<i>Bryan v. Itasca County</i> , 426 U.S. 373 (1976)	12
<i>California v. Cabazon Band of Mission Indians</i> , 480 U.S. 216 (1987).....	12
<i>Catawba Indian Tribe v. South Carolina</i> , 718 F.2d 1291 (4th Cir. 1983), <i>rev'd on other grounds</i> , 476 U.S. 498 (1986).....	15
<i>Cayuga Indian Nation of New York v. Cuomo</i> , 565 F. Supp. 1297 (N.D.N.Y. 1983).....	18
<i>Choate v. Trapp</i> , 224 U.S. 665 (1912).....	6, 7
<i>Cotton Petroleum Corporation v. New Mexico</i> , 490 U.S. 163 (1989).....	12
<i>County of Yakima v. Yakima Indian Nation</i> , 502 U.S. 251 (1992).....	<i>passim</i>
<i>Department of the Interior v. South Dakota</i> , ___ U.S. ___, 117 S. Ct. 286 (1996).....	10
<i>Epps v. Andrus</i> , 611 F.2d 915 (1st Cir. 1979).....	15
<i>Federal Power Com'n v. Tuscarora Indian Nation</i> , 265 F.2d 338 (C.A.D.C. 1958), <i>rev'd</i> , 362 U.S. 99 (1960), <i>reh. denied</i> , 362 U.S. 956 (1960).....	19
<i>Federal Power Com'n v. Tuscarora Indian Nation</i> , 362 U.S. 99 (1960), <i>reh. denied</i> , 362 U.S. 956 (1960).....	16

TABLE OF AUTHORITIES – Continued

	Page
<i>Golden Hill Paugusset Tribe of Indians v. Weicker</i> , 39 F.3d 51 (2d Cir. 1994).....	15
<i>Goudy v. Meath</i> , 203 U.S. 146 (1906).....	2, 3
<i>Lummi Indian Tribe v. Whatcom County, Washington</i> , 5 F.3d 1355 (9th Cir. 1993), <i>cert. denied</i> , 114 S. Ct. 2727 (1994).....	15
<i>Mahnomen County v. United States</i> , 319 U.S. 474 (1943).....	8
<i>Mashpee Tribe v. New Seabury Corp.</i> , 592 F.2d 575 (1st Cir. 1979).....	18
<i>McClanahan v. Arizona State Tax Com'n</i> , 411 U.S. 164 (1973).....	12
<i>Mescalero Apache Tribe v. Jones</i> , 411 U.S. 145 (1973).....	11, 12
<i>Mohegan Tribe v. Connecticut</i> , 638 F.2d 612 (2d Cir. 1980), <i>cert. denied</i> , 452 U.S. 961 (1981).....	18
<i>Montana v. Blackfeet Tribe</i> , 471 U.S. 759 (1985).....	12
<i>Montana v. United States</i> , 450 U.S. 544 (1981).....	13
<i>Mountain States Tel. & Tel. v. Pueblo of Santa Ana</i> , 472 U.S. 237 (1985).....	18
<i>Narragansett Tribe of Indians v. Southern R.I. Land Dev. Corp.</i> , 418 F. Supp. 798 (D.R.I. 1976).....	18
<i>Oklahoma Tax Com'n v. Chickasaw Nation</i> , 515 U.S. 450 (1995).....	12
<i>Oklahoma Tax Com'n v. Sac and Fox Nation</i> , 508 U.S. 114 (1993).....	12
<i>Oneida Indian Nation v. County of Oneida</i> , 414 U.S. 661 (1974).....	16, 18

TABLE OF AUTHORITIES – Continued

	Page
<i>South Dakota v. Bourland</i> , 508 U.S. 679 (1993).....	13
<i>State v. A-1 Contractors</i> , ___ U.S. ___, 117 S. Ct. 1404 (1997).....	13
<i>Tonkawa Tribe of Oklahoma v. Richards</i> , 75 F.3d 1039 (5th Cir. 1996).....	18
<i>Tuscarora Nation v. Power Authority of the State of New York</i> , 257 F.2d 885 (2d Cir. 1958).....	19
<i>United States v. 7405.3 Acres of Land</i> , 97 F.2d 417 (4th Cir. 1938).....	18
<i>United States v. Candelaria</i> , 271 U.S. 432 (1926).....	16
<i>United States v. Mazurie</i> , 419 U.S. 544 (1975).....	13
<i>United States v. Mitchell</i> , 445 U.S. 535 (1980).....	8
<i>United States v. Nice</i> , 241 U.S. 591 (1916).....	8
<i>United States v. Rickert</i> , 188 U.S. 432 (1903).....	7
<i>United States v. Sandoval</i> , 231 U.S. 28 (1913).....	17
<i>United States v. University of New Mexico</i> , 731 F.2d 703 (10th Cir. 1984), <i>cert. denied</i> , 469 U.S. 853 (1984).....	18
<i>United States v. Wheeler</i> , 435 U.S. 313 (1978).....	13
<i>Washington v. Confederated Tribes of Colville Reservation</i> , 447 U.S. 134 (1980).....	13
<i>Williams v. Lee</i> , 358 U.S. 217 (1959).....	13
FEDERAL STATUTES	
25 U.S.C. § 177 (1996).....	14
25 U.S.C. § 379.....	8

TABLE OF AUTHORITIES – Continued

	Page
25 U.S.C. § 462 (1996)	9
25 U.S.C. § 465 (1996)	9, 10
Public Law 280, 28 U.S.C. § 1360 (1996)	12
Act of July 1, 1902, ch. 1362, 32 Stat. 641	6
Act of May 27, 1908, ch. 199, 35 Stat. 312	6
Act of June 30, 1919, ch. 4, 41 Stat. 3	6
Act of February 25, 1920, ch. 87, 41 Stat. 452	6
Act of June 7, 1924, 43 Stat. 636	17
Curtis Act of June 28, 1898, ch. 517, 30 Stat. 495	5
Navajo-Hopi Rehabilitation Act of 1950, 25 U.S.C. § 635 (1996)	19
New Mexico, Arizona Enabling Act, 36 Stat. 557	17
 DECISIONS OF OTHER JURISDICTIONS	
<i>Anderson & Middleton Lumber Company v. Quinault Indian Nation</i> , 919 P.2d 379 (Wash. 1996)	15
<i>Goudy v. Meath</i> , 80 P. 295 (Wash. 1905)	4
 ADMINISTRATIVE RULES	
25 C.F.R. § 151.10	9
25 C.F.R. § 151.10(e)	9
25 C.F.R. § 151.12(6)	10
 MISCELLANEOUS	
Black's Law Dictionary (6th ed. 1990) at 754	2
H.R. Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934)	11

REPLY BRIEF OF PETITIONERS

Petitioners ("Cass County" or "the County") respectfully submit this Reply Brief, in response to Respondent's Brief filed by the Leech Lake Band of Chippewa Indians ("the Band").

ARGUMENT

I. CONGRESS HAS MADE UNMISTAKABLY CLEAR ITS INTENT THAT TAXABILITY OF TRIBAL FEE LAND IS A NECESSARY CONSEQUENCE OF ITS ALIENABILITY.

A. The *Yakima* Decision Applied The Unmistakably Clear Intent Rule And Found It Satisfied By Implication.

Much of the Band's argument focuses on the lack of an express statutory statement establishing the taxability of the lands at issue. The Band concludes that absent an express statement the unmistakably clear intent rule applicable to Indian taxation issues cannot be satisfied. However, this Court's decisions require only clear intent, not necessarily an express statement of intent. This distinction is illustrated by the language of the Court in *Yakima*, which the Band ignores. In demonstrating that an express statement is not the only way in which Congress can make clear its intent to permit state taxation of Indians or Indian property, the Court said:

In other words, the [Burke Act] proviso *reaffirmed* for such "prematurely" patented land what § 5 of the General Allotment Act implied with respect to patented land generally: subjection to real estate taxes.

County of Yakima v. Yakima Indian Nation, 502 U.S. 251, 264 (1992) (emphasis added, footnote omitted). And the court stated further:

Since the proviso is nothing more than an acknowledgment (and clarification) of the operation of § 5 with respect to *all* fee-patented land, it is inconsequential that the trial record does not reflect "which (if any) of the parcels owned in fee by the

Yakima Nation or individual members originally passed into fee status pursuant to the proviso, rather than at the expiration of the trust period. . . .” Brief for United States as *Amicus Curiae* 13, n.10.

Id. n.4 (emphasis by Court). As this straightforward language shows, the *Yakima* Court concluded that express language was not necessary for section 5 of the General Allotment Act to permit state taxation of tribally-owned fee land. Moreover, the Burke Act proviso in section 6 of the General Allotment Act served simply to make it clear that “prematurely” patented land, as well as land generally allotted under section 5, would become taxable upon issuance of the fee patent.

In contending that an implication cannot satisfy the unmistakably clear intent rule, the Band states that “It tortures the language to equate ‘imply’ with making something unmistakably clear.” Resp. Br. at 33-34 n.2.* To the contrary, “implied” is defined in Black’s Law Dictionary as “used in law in contrast to ‘express’, i.e., where the intention in regard to the subject-matter is not manifested by explicit and direct words, but is gathered by implication or *necessary deduction* from the circumstances, the general language, or the conduct of the parties.” Black’s Law Dictionary (6th ed. 1990) at 754 (emphasis added).

Thus, Congress’ clear intent can be shown by implication as well as by express language. If this Court had considered express permission by Congress necessary for taxation of alienable tribal land it would have said so in *Yakima*.

B. The Goudy Court Based Its Holding Of Taxability On The Alienability Of The Land In Question.

The Band argues that this Court’s decision in *Goudy v. Meath*, 203 U.S. 146 (1906), upholding the taxability of land owned in fee by an individual Indian, was not really grounded on the free alienability of the land. Resp. Br. at 36-40. Instead, referring to both this Court’s decision in *Goudy* and the Washington Supreme Court decision which gave rise to Goudy’s

* “Resp. Br. at ____” designates pages in Respondent’s Brief.

appeal, the Band argues that the holding of taxability was based primarily on the fact that Goudy, by virtue of an Act of Congress, had become a citizen of the United States, and therefore had lost his rights to his inherent immunities as an Indian. Resp. Br. at 37. In short, the Band concludes that “Goudy himself was considered to be, not an Indian, but a ‘citizen’ of the United States.” Resp. Br. at 40.

The *Goudy* decision, however, was not, as asserted by the Band, grounded on the fact that “the jurisdictional bar against state taxation . . . was removed by Goudy’s citizenship.” Resp. Br. at 38. To the contrary, as this Court explained in *Yakima*, 502 U.S. at 263, the *Goudy* decision was grounded on the alienability of the land in question. The *Yakima* Court said:

But (and now we come to the misperception [on the part of the Yakima Nation and *Amicus* United States] concerning the *structure* of the General Allotment Act) *Goudy* did not rest exclusively, or even primarily, on the § 6 grant of personal jurisdiction over allottees to sustain the land taxes at issue. Instead, it was the *alienability of the allotted lands* – a consequence produced in these cases not by § 6 of the General Allotment Act, but by § 5 – that the Court found of central significance. As the first basis of its decision, before reaching the “further” point of personal jurisdiction under § 6, *id.*, at 149, the *Goudy* Court said that, although it was certainly possible for Congress to “grant the power of voluntary sale, while withholding the land from taxation or forced alienation,” such an intent would not be presumed unless it was “clearly manifested.” *Ibid.*

(emphasis by Court, footnote omitted).

Notwithstanding this clarification by the Court that the basis for the holding of taxability in *Goudy* was the alienability of the land, the Band contends that the *sine qua non* for that holding was “*Goudy’s* (sic) renunciation of his tribal relations – which removed him from the special jurisdictional protections given to Indians.” Resp. Br. at 40. A review of the Washington Supreme Court decision giving rise to Goudy’s appeal to this Court shows that the Washington Court no more grounded its

decision on the fact that Goudy had renounced his membership in the Puyallup Tribe than did this Court in affirming that decision.

Rather than the narrow holding described by the Band, the state court decision, like its affirmance by this Court, was based on the land's alienability. And there can be no doubt that the Washington Court considered its decision applicable to Indians generally; it plainly did not, as urged by the Band, consider its decision applicable only to Goudy as a "citizen." Regarding the release by Congress of the restrictions on alienability previously imposed by the applicable treaty and patent, the court said:

As we have attempted to show above, the restrictions named in the treaty and in the patent were upon the alienation of the land. Congress intended that the Indian should not dispose of his lands until a certain time. In order to accomplish this object, it was necessary to provide against involuntary as well as voluntary sale. . . . These restrictions are against alienation. . . . It follows that these restrictions have been removed, and that the land in question is now taxable.

Goudy v. Meath, 80 P. 295, 297 (Wash. 1905). *Goudy* is thus far more than the "relatively minor, fact-specific opinion" described by the Band at page 36 of its brief.

To sum up, both *Goudy* and *Yakima* are consistent with the development of the statutory law from the allotment period through enactment of the IRA to the present time: absent a clearly manifested directive by Congress to the contrary, freely alienable land owned in fee by an Indian tribe or its members is subject to state and local taxation.

C. Unless Expressly Provided Otherwise, Congress Has Consistently Linked The Free Alienability Of Indian Land Owned In Fee With Its Taxability.

The Band incorrectly characterizes Cass County's position in this case as claiming that Congress treats the terms "alienable" and "taxable" as "synonymous." Resp. Br. at 17. To the

contrary, the County's position in this case, while recognizing that "alienability" and "taxability" are separate and distinct concepts, also recognizes that they are linked together in the historical context of Congress' treatment of Indian-owned lands.

One example of Congress' recognition of this linkage is found in the Curtis Act of June 28, 1898, ch. 517, 30 Stat. 495, cited and discussed at pages 17-18 of Respondent's Brief. The Act provides in relevant part:

All the lands allotted shall be nontaxable while the title remains in the original allottee, but not to exceed twenty-one years from the date of patent, and each allottee shall select from his allotment a homestead of one hundred and sixty acres, for which he shall have a separate patent, and which shall be inalienable for twenty-one years from date of patent.

30 Stat. at 507. The Band interprets this provision as permitting non-homestead land to be "nontaxable but still alienable," with homesteads "both nontaxable and nonalienable." Resp. Br. at 18. That interpretation is only partly correct. Rather than simply permitting non-homestead land to be "nontaxable but still alienable," the statute provides that such land remains nontaxable only while the title remains in the original allottee, with its nontaxable status not to exceed twenty-one years from the date of issuance of the patent. In other words, the non-homestead land remains exempt from taxation for a period of twenty-one years only so long as the allottee does not convey it to someone else. Once alienated, it loses the trust protection and becomes taxable.

In enacting this statute Congress gave the allottee a grace period of twenty-one years before his non-homestead land would become taxable. This demonstrates that Indian-owned land is not automatically tax-exempt. Congress found it necessary to expressly provide a twenty-one-year exemption period for the original allottee, with the clear implication that the land would become taxable before expiration of that period if owned by anyone else, including another individual Indian or an Indian tribe.

Thus the tax exemption for the land turned not on the status of its owner as an Indian but on the owner's status as the original allottee. This provision is consistent with Cass County's position that alienable land is subject to taxation unless Congress expressly provides otherwise. Here, Congress expressly provided a tax exemption for the original allottee limited to twenty-one years.

Likewise, the other statutes¹ cited and discussed by the Band at pages 18-19 of its brief link nonalienability with nontaxability. That is, they provide that allotted lands are exempt from taxation so long as restrictions on their alienability remain in place, but become taxable when those restrictions are removed by Congress. Thus the treatment of Indian-owned lands by Congress has generally remained the same from the allotment era to the present time. If lands are held in trust by the federal government or are under some other restriction against alienation imposed by Congress, they are exempt from taxation. If, on the other hand, they become freely alienable and are not exempt under some other provision of law, they become subject to state and local taxation.

The Band also cites the decision in *Choate v. Trapp*, 224 U.S. 665 (1912), as support for its contention that there is no linkage, as a general principle, between alienability and taxability with respect to Indian-owned lands. That decision does not support that contention; it stands instead for the proposition that once Congress has granted an exemption from state and local property taxes for a specified period of time, that exemption cannot be cut short, even by congressional action.

The land at issue in *Choate* had been allotted to members of the Choctaw and Chickasaw Tribes pursuant to the Curtis Act, *supra*, as amended by the Act of July 1, 1902, ch. 1362, 32 Stat. 641. See 224 U.S. at 668-69. In a 1908 enactment, Congress removed all restrictions on alienation of the allotted lands and provided that the lands were subject to immediate

¹ Those statutes are: Act of June 30, 1919, ch. 4, 41 Stat. 3, 16; Act of February 25, 1920, ch. 87, 41 Stat. 452; and Act of May 27, 1908, ch. 199, 35 Stat. 312, 313.

taxation. *Id.* at 670. On appeal by the Tribes from a decision of the Oklahoma Supreme Court ruling that the State's subsequent assessment of property taxes was proper, this Court held that, notwithstanding Congress' repeal of the tax exemption, Oklahoma's imposition of a tax on the lands was improper because the original twenty-one-year tax exemption granted by Congress "was binding upon Oklahoma," *id.* at 673, as "a vested property right which could not be abrogated by statute." *Id.* at 678-79. As long as an allottee did not sell his land it remained tax-exempt for the original twenty-one-year period. *Id.* at 673.

Thus the *Choate* decision, holding that an exemption from property taxes granted for a specified period of time cannot be shortened by subsequent legislation, is inapposite to this case involving the issue of whether, in the absence of congressional legislation to the contrary, taxability is a consequence of alienability. This case does not involve the kinds of legislative amendments at issue in *Choate* and, as discussed above, Congress has consistently linked restrictions on the alienation of Indian lands with the tax exemption of those lands.

This Court, in a number of decisions over the years, has also recognized that linkage. For example, in *United States v. Rickert*, 188 U.S. 432 (1903), the Court expressly recognized that land allotted under the General Allotment Act, including permanent improvements thereon, was exempt from taxation only by virtue of its being held in trust for the allottee by the United States.² The Court said:

[U]ntil a regular patent conveying the fee was issued to the several allottees, it would follow that there was no power in the State of South Dakota, for state or municipal purposes, to assess and tax the lands in question until at least the fee was conveyed to the Indians.

Id. at 437.

and

² Significantly, *Rickert* was decided prior to enactment of the Burke Act in 1906, which the court of appeals held was required for taxation of the lands in this case. See Pet. App. 15-18.

While the title to the land remained in the United States, the permanent improvements could no more be sold for local taxes than could the land to which they belonged.

Id. at 442. See also *United States v. Nice*, 241 U.S. 591, 601-02 (1916) (citing *Rickert* for the rule that land held in trust by the federal government is exempt from taxation).

To the same effect was the decision in *Mahnomen County v. United States*, 319 U.S. 474 (1943), where the Court, in determining whether an individual Indian had paid taxes on her property voluntarily or involuntarily, stated that she had "no conceivable claim of exemption" after expiration of the twenty-five-year trust period provided under the General Allotment Act. *Id.* at 478. And nearly forty years later, after reviewing the legislative history underlying passage of the General Allotment Act, the Court concluded that:

It is plain, then, that when Congress enacted the General Allotment Act, it intended that the United States "hold the land . . . in trust" . . . simply because it wished to prevent alienation of the land and to ensure that allottees would be immune from the state taxation.

United States v. Mitchell, 445 U.S. 535, 544 (1980).

To summarize, in the absence of specific legislation to the contrary,³ freely alienable land owned in fee by a tribe or tribal member is subject to state taxation.

³ Amici Curiae Hoopa Valley Tribe, et al., argue that alienable lands should be considered taxable only if Congress expressly provides so. See Brief of Hoopa Valley Tribe at 11-16. Amici cite 25 U.S.C. § 379 as an "allotment statute" containing "a provision for the taxation of property alienated thereunder." *Id.* at 15. Rather than an allotment statute, section 379 is a provision in the general Indian Descent and Distribution laws which, with certain exceptions, permits the heirs of a deceased allottee to sell inherited trust land or other land "containing restrictions upon alienation." The statute simply makes it clear that, in this particular circumstance, such "restricted" land becomes taxable upon sale by a deceased allottee's heirs. In addition, the statutes cited at page 15 of the Amicus Brief, providing explicit exemptions from taxation with respect to

D. Enactment Of The Indian Reorganization Act Reaffirmed Congress' Intent To Link Alienability With Taxability.

The Band argues that Congress, by its silence, has not shown an unmistakably clear intent that lands such as those sold to non-Indians under sections 4, 5, and 6 of the Nelson Act remain subject to ad valorem taxation upon subsequent reacquisition by the Tribe. Resp. Br. at 11-12. The basis for this argument is that Congress, operating under the assumption during the allotment era that tribal ownership of land would in the future cease to exist, saw "no need to think of, consider, or legislate about what would happen if surplus lands eventually went back into tribal ownership." Resp. Br. at 13. While the Band may be correct that during the allotment era Congress was not anticipating reacquisition of Indian lands by the tribes, it clearly did so in enacting the Indian Reorganization Act ("the IRA") in 1934.

In enacting the IRA Congress passed specific legislation applicable to Indian lands reacquired by both tribes and tribal members. The IRA extended any existing trust periods and restrictions on alienation covering allotted lands. 25 U.S.C. § 462 (1996). It also permitted the Secretary of the Interior to purchase lands in trust for Indian tribes or individual Indians, specifying that the trust lands would be exempt from state and local taxation. 25 U.S.C. § 465 (1996). The regulations implementing section 465 clearly recognize that land owned in fee by an Indian tribe or its members is subject to ad valorem taxation. For example, state and local governments are expressly permitted to comment on a federal proposal to place lands in trust, see 25 C.F.R. § 151.10; and the Secretary of the Interior is required to take into consideration "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls." 25 C.F.R. § 151.10(e). Furthermore, the Secretary is now required to give 30 days

specific land transactions, are consistent with Congress' practice of using express language when it intended that Indian lands be exempt from taxation.

notice before taking land into trust, 25 C.F.R. § 151.12(6), and judicial review is permitted during that 30-day period before title is transferred to the United States. See *Department of the Interior v. South Dakota*, ___ U.S. ___, 117 S. Ct. 286, 287 (1996).

These provisions of the IRA and the applicable regulations are also consistent with section 461 of the IRA which prohibits future allotments to individual Indians but does not return "allotted land to pre-General Allotment Act status, leaving it fully alienable by the allottees, their heirs, and assigns." *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251, 264 (1992). As this Court stated in *Yakima*, by leaving the previously allotted lands fully alienable, Congress "chose not to terminate state taxation upon those lands as well." *Id.* And if Congress chose not to make allotted lands exempt from taxation, there is no reason to believe that it would render other lands held in fee, whether owned by individual Indians or Indian tribes, tax-exempt.

To summarize, if Congress had wished to exempt tribal fee lands from taxation it would have done so as part of the IRA. Instead, Congress enacted section 465 of the IRA which authorizes the Secretary of the Interior, in his discretion, to acquire lands in trust and exempt from taxation for the benefit of individual Indians or Indian tribes. If, as the Band urges, land owned in fee by Indian tribes is exempt from taxation in the absence of an express statement by Congress to the contrary, there would have been no need for Congress to enact the tax exemption language in section 465 of the IRA.

II. THE RULE THAT TAXABILITY OF TRIBAL LAND IS A NECESSARY CONSEQUENCE OF ITS ALIENABILITY DOES NOT UNDERMINE THE CONGRESSIONAL POLICY PROMOTING TRIBAL SELF-GOVERNANCE.

A. The IRA Demonstrates The Consistency Between Cass County's Position In This Case And The Federal Government's Policy Of Tribal Self-Governance.

On pages 21-25 of Respondent's Brief the Band makes the argument, as did the Yakima Nation in *County of Yakima v.*

Yakima Indian Nation, 502 U.S. 251 (1992), that taxation of its land would infringe upon its right of self-governance. That argument is without merit.

As this Court has observed, "the intent and purpose of the IRA was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'" *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151-52 (1973) (quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934)). If Congress believed that taxation of freely alienable tribal lands would undermine the goals of the IRA, it would have sheltered those lands from taxation. It did not do so, however. Rather, it provided tax-exempt status only to lands held in trust pursuant to section 465.

In dismissing the same infringement argument in *Yakima*, the Court stated:

Turning away from the statutory texts altogether, the Yakima Nation argues that state jurisdiction over reservation fee land is manifestly inconsistent with the policies of Indian self-determination and self-governance that lay behind the Indian Reorganization Act and subsequent congressional enactments. This seems to us a great exaggeration. While the *in personam* jurisdiction over reservation Indians at issue in *Moe* would have been significantly disruptive of tribal self-government, the mere power to assess and collect a tax on certain real estate is not. In any case, these policy objections do not belong in this forum. If the Yakima Nation believes that the objectives of the Indian Reorganization Act are too much obstructed by the clearly retained remnant of an earlier policy, it must make that argument to Congress.

Id. at 265.

Thus, as this Court has determined, state taxation of freely alienable tribal land held in fee, in the absence of an express directive by Congress to the contrary, is consistent with both the comprehensive statutory framework of the IRA and the goals underlying the enactment of that law.

B. The *In Personam* Tax Cases Cited By The Band Are Inapposite To The Issue In This Case.

In rejecting the Yakima Nation's argument that taxation of its land interfered with its right of self-governance, the Court drew a clear distinction between *in personam* taxes which result in personal liability and *in rem* real estate taxes which are an encumbrance upon the land. *Yakima*, 502 U.S. at 265 (quoted at p. 11, *supra*).

In making both its statutory and infringement arguments, the Band disregards this distinction.⁴ For example, the Band relies heavily on this Court's decision in *Bryan v. Itasca County*, 426 U.S. 373 (1976), for the proposition that even a "broadly worded" statute like Public Law 280, 28 U.S.C. § 1360, was not clear enough to support a personal property tax on an Indian-owned mobile home. Resp. Br. at 9.

Bryan, like the other *in personam* tax cases cited by the Band, is distinguishable from this case. The basic issue in *Bryan* was whether Public Law 280 granted the State sufficiently broad civil jurisdiction to permit imposition of the tax in question. *Id.* at 381. The Court held that it did not. *Id.* at

⁴ None of the eight cases cited by the Band as support for its unmistakably clear intent argument on pages 8 and 9 of its brief involve the taxation of tribal land: *McClanahan v. Arizona State Tax Com'n*, 411 U.S. 164 (1973) (personal income tax on reservation Indian deriving entire income from reservation sources); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) (state use tax on personalty installed on off-reservation federal trust land); *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985) (tribal royalty income from oil and gas leases issued to non-Indian lessees); *Cotton Petroleum Corporation v. New Mexico*, 490 U.S. 163 (1989) (oil and gas severance taxes imposed on non-Indian oil and gas producers operating on reservation); *California v. Cabazon Band of Mission Indians*, 480 U.S. 216 (1987) (state regulation of bingo operations conducted by tribes on reservations); *Oklahoma Tax Com'n v. Sac and Fox Nation*, 508 U.S. 114 (1993) (income tax on tribal members earning income from Tribe and living in "Indian Country and motor vehicle tax on tribal members living and keeping vehicles on tribal land); *Oklahoma Tax Com'n v. Chickasaw Nation*, 515 U.S. 450 (1995) (motor fuels tax on tribal retailer operating on reservation).

388-89. In contrast, the issue in this case is whether Congress has provided the State with the relatively narrow *in rem* jurisdiction necessary to impose a tax on freely alienable tribal land owned in fee. As this Court held in *Yakima*, Congress has done so.

C. The *In Personam* Regulatory Cases Cited By The Band Are Inapposite To The Issue In This Case.

In making its infringement argument, the Band also cites a number of decisions involving regulatory issues which are inapposite to the *in rem* property tax issue in this case.⁵ Those decisions are inapposite because they apply a "balancing of interests" test which is not applicable to tax cases. As this Court explained in *Yakima*:

Either Congress intended to pre-empt the state taxing authority or it did not. Balancing of interests is not the appropriate gauge for determining validity [of a tax] since it is that very balancing which we have reserved to Congress.

Id. at 267 (quoting *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 177 (1980)). It is apparent that Congress has conducted such a balancing of interests test with respect to state taxation of freely alienable tribal land; and the result is a body of federal law evincing, as to the issue in this case, Congress' unmistakably clear consent to the taxation of such land.

⁵ *United States v. Mazurie*, 419 U.S. 544 (1975) (prosecution of non-Indian for illegal introduction of alcoholic beverages into reservation); *United States v. Wheeler*, 435 U.S. 313 (1978) (federal criminal prosecution); *Williams v. Lee*, 358 U.S. 217 (1959) (civil suit by non-Indian against Indian with cause of action arising on reservation); *Montana v. United States*, 450 U.S. 544 (1981) (regulation of hunting and fishing); *South Dakota v. Bourland*, 508 U.S. 679 (1993) (regulation of hunting and fishing); *State v. A-1 Contractors*, ___ U.S. ___, 117 S. Ct. 1404 (1997) (civil lawsuit against non-Indians with cause of action arising on non-Indian land); *Brendale v. Yakima Indian Nation*, 492 U.S. 408 (1989) (regulation by Yakima Nation of use of land owned by non-Indians).

III. THE INDIAN NONINTERCOURSE ACT DOES NOT APPLY TO THE TRIBAL LANDS AT ISSUE IN THIS CASE.

A. The Indian Nonintercourse Act Applies Only To Tribal Lands Which Have Never Been Made Alienable By Consent Of Congress.

The Band's final argument in support of nontaxability is that the tribal lands at issue in this case are governed by the Indian Nonintercourse Act ("the INA"), 25 U.S.C. § 177 (1996), which renders them inalienable and therefore exempt from taxation.⁶ Resp. Br. at 41-50. The Act provides in relevant part:

No purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

25 U.S.C. § 177 (1996).

The apposite case law shows that the INA applies only to lands which have never been made alienable by consent of Congress. For that reason it does not apply to the lands at issue in this case, which were rendered alienable under the Nelson and General Allotment Acts. The Band's complaint commencing this action states that the Band owns these lands "in fee simple, free of any trust ownership on the part of the United States," and that "[t]he Band acquired the Properties by deed

⁶ The Band filed a Conditional Cross Petition for a Writ of Certiorari which was denied on November 3, 1997. Supreme Court File No. 97-235. Since that Petition, which would have encompassed the land parcels held taxable by the court of appeals, was denied, the Band's INA argument can apply only to the parcels which the court of appeals held exempt from taxation (those sold to non-Indians as pine lands and under the Homestead Act in accordance with sections 4, 5, and 6 of the Nelson Act). The Band's INA argument cannot apply to the parcels held taxable by the court of appeals, because such an argument would seek to expand, rather than simply defend, the judgment below in favor of the Band.

from private owners." Pet. App. 53-54, 55. Because the lands are now tribal property the Band claims that it cannot alienate them without the consent of the United States. As the Ninth Circuit Court of Appeals observed, however: "No court has held that Indian land approved for alienation by the federal government and then reacquired by a tribe again becomes inalienable. To the contrary, courts have said that once Congress removes restraints on alienation of land, the protections of the Nonintercourse Act no longer apply." *Lummi Indian Tribe v. Whatcom County, Washington*, 5 F.3d 1355, 1359 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 2727 (1994) (citations omitted).

In addition to *Lummi* a number of other federal court decisions demonstrate that an essential element for application of the INA to tribal fee land is that "the United States has never approved or consented to the alienation of the tribal land." *Catawba Indian Tribe v. South Carolina*, 718 F.2d 1291, 1295 (4th Cir. 1983), *rev'd on other grounds*, 476 U.S. 498 (1986); *Epps v. Andrus*, 611 F.2d 915, 917 (1st Cir. 1979); *Golden Hill Paugusset Tribe of Indians v. Weicker*, 39 F.3d 51, 56 (2d Cir. 1994). There is no question that Congress, pursuant to the Nelson Act of 1889, approved the alienation of the lands reacquired by the Band in this case, including the allotted lands and the lands sold to non-Indians as pine lands and under the Homestead Act. For that fundamental reason those lands are not today subject to the INA.⁷

B. The Cases Cited By The Band Also Show That The INA Applies Only To Tribal Lands Which Have Never Been Made Alienable By Consent Of Congress.

On pages 43-48 of Respondent's Brief the Band cites three decisions of this Court and numerous lower federal

⁷ See also *Anderson & Middleton Lumber Company v. Quinault Indian Nation*, 919 P.2d 379, 387 (Wash. 1996) (holding that the INA does not apply to land patented in fee under the General Allotment Act and subsequently reacquired by an Indian Nation).

court decisions as support for its INA argument. Those decisions do not provide support for the proposition that tribal land made freely alienable by congressional action, and subsequently reacquired in fee by an Indian tribe, becomes once again inalienable under the INA or any other federal statute. Rather, those decisions confirm that the INA applies only to tribal lands which have never been rendered alienable by congressional consent. Taking first the Supreme Court decisions cited by the Band:

In *Federal Power Com'n v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), *reh. denied*, 362 U.S. 956 (1960), the Court held that fee lands originally obtained by the United States for the Tuscarora Nation in 1804, held in trust for the Nation by the Secretary of War from 1804 to 1809, and subsequently conveyed to the Nation by the United States, were subject to condemnation under the Federal Power Act because the INA is not applicable to the federal government. *Id.* at 120, 134. In *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974), the Court held that the cession of aboriginal lands by the Oneida Indian Nation to New York State in 1795, without the consent of the United States, was invalid under the first INA, 1 Stat. 137, 138, enacted in 1790. *Oneida*, 414 U.S. at 664-68. Finally, the Band cites *United States v. Candelaria*, 271 U.S. 432 (1926), as holding that "the INA applies to Pueblo lands even though they are held by fee simple title." *Resp. Br.* at 46-47. That description of the holding in *Candelaria* is correct as far as it goes, but the determinative fact respecting application of the INA in *Candelaria* was that Congress had never consented to the alienation of the lands at issue. Specifically, the Court held that a lower court judgment transferring ownership of Indian lands, in the absence of authorization or appearance by the United States in the court action, violated the INA. *See id.* at 443-44.

Thus, the facts in these cases,⁸ involving lands which had never been made alienable by consent of Congress, are clearly distinguishable from the facts in this case involving reacquisition of lands by the Band where Congress, through the Nelson Act, had previously given its consent to alienation.

Among the lower federal court decisions which the Band claims support its INA argument, it cites as "particularly relevant" the decision in *Alonzo v. United States*, 249 F.2d 189 (10th Cir. 1957), *cert. denied*, 355 U.S. 940 (1958). The Band asserts that *Alonzo* stands for the proposition that the INA applies to tribal lands no matter how acquired by the tribe. *Resp. Br.* at 47-48. The Band's description of the holding in *Alonzo* does not tell the whole story.

In addition to the INA, the court in *Alonzo* dealt with section 2 of the New Mexico, Arizona Enabling Act, 36 Stat. 557-59, which provided that all lands governed by the Act, "the right or title to which [was] acquired [by any Indian or Indian tribes] through or from the United States or any prior sovereignty [would] remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States. . . ." The *Alonzo* court concluded that the Enabling Act did not terminate the application of the INA to the lands in question, *id.* at 196, and also relied for its holding of non-alienability on section 17 of the Act of June 7, 1924, 43 Stat. 636, 641, which provided in relevant part that:

No right, title or interest in or to the lands of the Pueblo Indians of New Mexico . . . and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto . . . shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior.

⁸ A fourth Supreme Court decision cited by the Band at page 47 of its brief did not expressly involve the INA, and simply held that Congress has the power to legislate with respect to lands owned in fee by Pueblo tribal members. *See United States v. Sandoval*, 231 U.S. 28, 48 (1913).

Id. at 195. Again, the INA was held to apply to tribal lands which had never been made alienable by consent of Congress.

The decision in *United States v. University of New Mexico*, 731 F.2d 703 (10th Cir. 1984), *cert. denied*, 469 U.S. 853 (1984), cited by the Band at page 47 of its brief, is distinguishable from this case for the same reason *Alonzo* is distinguishable. In holding that the lands in question were inalienable, the court said:

The Pueblo Lands Act of 1924 required that the United States, "in its sovereign capacity as guardian of said Pueblo Indians," file suits on their behalf to quiet title to their lands. Ch. 331, § 1, 43 Stat. 636. Section 17 of the Pueblo Lands Act [the same operative provision cited by the Tenth Circuit in *Alonzo*] reaffirmed that the Pueblos and their lands were fully under the guardianship of Congress and the protection of the Nonintercourse Act. *Id.* at 641-42.

731 F.2d at 706.⁹ The balance of the lower court decisions¹⁰ cited by the Band as support for its INA argument, Resp. Br. at 45-47, are similarly inapposite to the facts in this case.

⁹ This Court has held that Congress intended section 17 of the Pueblo Lands Act, rather than the INA, to apply to Pueblo lands. See *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 250-51 (1985).

¹⁰ *Mohegan Tribe v. Connecticut*, 638 F.2d 612, 623 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981) and *Cayuga Indian Nation of New York v. Cuomo*, 565 F.Supp. 1297, 1315 (N.D.N.Y. 1983) (both involving purchase of aboriginal Indian land without federal approval); *Narragansett Tribe of Indians v. Southern R.I. Land Dev. Corp.*, 418 F.Supp. 798, 807 (D.R.I. 1976) (citing *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-69 (1974), and stating that "[T]he Act was designed precisely to protect aboriginal title"); *United States v. 7405.3 Acres of Land*, 97 F.2d 417, 422 (4th Cir. 1938) (land held in trust for the Tribe by the United States); *Tonkawa Tribe of Oklahoma v. Richards*, 75 F.3d 1039, 1047 (5th Cir. 1996) (claim to lands under Texas law – court stating that purpose of INA was to protect Indian tribes' aboriginal title); *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 588, 590 (1st Cir. 1979) (affirming jury verdict that tribe had voluntarily abandoned tribal status for purposes of INA).

None of them involves lands which have already been rendered alienable by consent of Congress.

C. The Statutory Law Does Not Support The Band's Contention That The Tribal Lands At Issue In This Case Are Governed By The INA.

The Band's final argument on the INA issue is that a review of certain congressional enactments supports its position that its tribal lands are inalienable. Resp. Br. at 48-50. Those federal enactments do not support the Band's position.

The primary congressional enactment relied upon by the Band as support for its INA argument is Congress' 1960 amendment of the Navajo-Hopi Rehabilitation Act of 1950, 25 U.S.C. § 635 (1996), which, among other things, lifted the restraints of the INA to permit the Navajo Tribe to convey previously purchased fee land without federal approval. Resp. Br. at 48-49. The Band asserts that that action by Congress demonstrates its recognition that the INA applies to tribal fee land. Resp. Br. at 48. That blanket assertion does not accurately state the reason for this legislation. The portion of the House Report on the Navajo-Hopi legislation quoted by the Band on page 49 of its brief shows that Congress was concerned about two cases holding that the INA prohibited the alienation of Indian lands in the absence of consent by Congress. *Federal Power Com'n v. Tuscarora Indian Nation*, 265 F.2d 338, 342 (C.A.D.C. 1958), *rev'd*, 362 U.S. 99, 105 (1960), *reh. denied*, 362 U.S. 956 (1960); *Tuscarora Nation v. Power Authority of the State of New York*, 257 F.2d 885, 887, 894-95 (2d Cir. 1958) (both involving lands originally conveyed to the Indian Nation by the United States in 1804). See *Jt. App.* at 15.** These decisions led the Department of the Interior to conclude that legislation was necessary to permit alienation of the land governed by the Rehabilitation Act. The Department's report stated with respect to the decisions: "We believe that the title should be unrestricted. Prior to the

** "Jt. App. at ____" designates pages in the Joint Appendix which has been filed with the Court.

Tuscarora decisions, the assumption was that such lands were unrestricted and were not subject to federal control." Jt. App. at 19.

Likewise, the special congressional enactments cited by the Band at pages 49-50 of its brief, which deal with particular matters of local concern, are not authority for the contention that the INA should be held applicable to fee lands acquired by Indian tribes on the open market, such as the lands in this case. The fact that Congress felt it necessary or advisable to pass special laws approving a few isolated real estate transactions provides no support for the Band's sweeping INA argument in this case.

CONCLUSION

Based on the foregoing reasoning and authorities, and those set forth in Cass County's initial brief, the County respectfully requests that the Court reverse that portion of the decision of the Eighth Circuit Court of Appeals holding that the pine land and homestead parcels are not subject to ad valorem taxation.

Dated: February 16, 1998

Respectfully submitted,

Office of Cass County
Attorney

EARL E. MAUS
Cass County Attorney
Counsel of Record
Cass County Courthouse
P.O. Box 3000
Walker, MN 56484
Telephone: (218) 547-7255
Counsel for Petitioners

Of Counsel:

MARK B. LEVINGER
JAMES W. NEHER
Assistant Attorneys General
State of Minnesota

15
No. 97-174

Supreme Court, U.S.
FILED

JAN 20 1998

In the Supreme Court of the United States

OCTOBER TERM, 1997

CASS COUNTY, MINNESOTA, ET AL., PETITIONERS

v.

LEECH LAKE BAND OF CHIPPEWA INDIANS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

**BRIEF FOR THE
UNITED STATES AS AMICUS CURIAE
SUPPORTING RESPONDENT**

SETH P. WAXMAN
Solicitor General

LOIS J. SCHIFFER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

BARBARA MCDOWELL
*Assistant to the Solicitor
General*

JAMES C. KILBOURNE

JUDITH RABINOWITZ

SYLVIA F. LIU

Attorneys

Department of Justice

Washington, D.C. 20530-0001

(202) 514-2217

37124

QUESTION PRESENTED

Whether Cass County may lawfully impose an ad valorem tax on lands owned in fee by the Leech Lake Band of Chippewa Indians and situated within the Leech Lake Reservation.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	1
Summary of argument	5
Argument	7
I. Congress has not given the requisite consent to state taxation of tribally owned reservation lands that were acquired by non-Indians under the Nelson Act but later reacquired by the band	7
A. A state cannot tax tribally owned lands on a reservation unless authorized by Congress with unmistakable clarity	7
B. Congress has not authorized the State or its political subdivision to tax the band on the lands at issue here	15
C. This Court has not adopted a rule that "alienability equals taxability" of tribally owned reservation lands	17
II. The band's tribally owned lands are not alienable, and thus are not taxable in any event, as a result of the Indian Nonintercourse Act	25
Conclusion	30

TABLE OF AUTHORITIES

Cases:

<i>Alonzo v. United States</i> , 249 F.2d 189 (10th Cir. 1957), cert. denied, 355 U.S. 1940 (1958)	27
<i>Bryan v. Itasca County</i> , 426 U.S. 373 (1976)	8, 10, 16, 24
<i>California v. Cabazon Band of Mission Indians</i> , 480 U.S. 202 (1987)	7, 12
<i>Carpenter v. Shaw</i> , 280 U.S. 363 (1930)	24

IV

Cases—Continued:	Page
<i>Cherokee Nation v. Georgia</i> , 30 U.S. (5 Pet.) 1 (1831)	6, 9, 12
<i>Choate v. Trapp</i> , 224 U.S. 665 (1912)	8, 23, 24
<i>County of Oneida v. Oneida Indian Nation</i> , 470 U.S. 226 (1985)	26
<i>County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation</i> , 502 U.S. 251 (1992)	passim
<i>DeCoteau v. District County Court</i> , 420 U.S. 425 (1975)	2
<i>Donnelly v. United States</i> , 228 U.S. 243 (1913)	28
<i>Federal Power Comm'n v. Tuscarora Indian Nation</i> , 362 U.S. 99 (1960)	30
<i>Goudy v. Meath</i> , 203 U.S. 146 (1906)	18, 22, 23
<i>Lease of Indian Lands for Grazing Purposes</i> , 18 Op. Att'y Gen. 235 (1885)	27
<i>Leech Lake Band of Chippewa Indians v. Herbst</i> , 334 F. Supp. 1001 (D. Minn. 1971)	2, 3
<i>Mahnomen County v. United States</i> , 319 U.S. 474 (1943)	24
<i>McClanahan v. Arizona State Tax Comm'n</i> , 411 U.S. 164 (1973)	8, 9, 10
<i>McCulloch v. Maryland</i> , 17 U.S. (4 Wheat.) 316 (1819)	6, 14
<i>Merrion v. Jicarilla Apache Tribe</i> , 455 U.S. 130 (1982)	12
<i>Mescalero Apache Tribe v. Jones</i> , 411 U.S. 145 (1973)	13
<i>Moe v. Salish and Kootenai Tribes</i> , 425 U.S. 463 (1976)	10, 12, 13, 21, 24
<i>Montana v. Blackfeet Tribe</i> , 471 U.S. 759 (1985) ..	7, 8, 10, 18

V

Cases—Continued:	Page
<i>Oklahoma Tax Comm'n v. Chickasaw Nation</i> , 515 U.S. 450 (1995)	10, 13
<i>Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe</i> , 498 U.S. 505 (1991)	6, 10, 11, 12, 14, 15
<i>Okahoma Tax Comm'n v. Sac and Fox Nation</i> , 508 U.S. 114 (1993)	8, 10, 13, 24
<i>Solem v. Bartlett</i> , 465 U.S. 463 (1984)	2, 16, 28
<i>South Carolina v. Baker</i> , 485 U.S. 505 (1988)	11
<i>State v. Clark</i> , 282 N.W.2d 902 (Minn. 1979), cert. denied, 445 U.S. 904 (1980)	2
<i>State v. Forge</i> , 262 N.W.2d 341 (Minn. 1977), appeal dismissed, 435 U.S. 919 (1978)	2, 3
<i>The Kansas Indians</i> , 72 U.S. (5 Wall.) 737 (1867)	9, 10, 22
<i>The New York Indians</i> , 72 U.S. (5 Wall.) 761 (1867)	10
<i>Tonkawa Tribe of Oklahoma v. Richards</i> , 75 F.3d 1039 (5th Cir. 1996)	27
<i>Tuscarora Indian Nation v. Federal Power Comm'n</i> , 265 F.2d 338 (D.C. Cir. 1958), rev'd on other grounds, 362 U.S. 99 (1960)	27
<i>United States ex rel. Santa Ana Pueblo v. University of New Mexico</i> , 731 F.2d 703 (10th Cir.), cert. denied, 469 U.S. 853 (1984)	26
<i>United States v. Celestine</i> , 215 U.S. 278 (1909)	13
<i>United States v. Mazurie</i> , 419 U.S. 544 (1975)	12
<i>United States v. Rickert</i> , 188 U.S. 432 (1903)	24
<i>Washington v. Confederated Tribes of Colville Indian Reservation</i> , 447 U.S. 134 (1980)	10, 24
<i>White Mountain Apache Tribe v. Bracker</i> , 448 U.S. 136 (1980)	9, 12, 14
<i>Wilson v. Omaha Indian Tribe</i> , 442 U.S. 653 (1979)	27, 28

VI

Cases—Continued:	Page
<i>Worcester v. Georgia</i> , 31 U.S. (6 Pet.) 515 (1832)	9
Constitution, treaties, statutes and regulation:	
U.S. Const.:	
Art. I, § 8, Cl. 3 (Indian Commerce Clause)	9
Art. II, § 2, Cl. 2	9
Treaty with the Chippewa Indians, February 22, 1855, 10 Stat. 1165	1
Art. VII, 10 Stat. 1169	25, 30
Act of July 22, 1790, ch. XXXIII, 1 Stat. 137	25
Act of Mar. 1, 1793, ch. XIX, 1 Stat. 329	25
Act of May 19, 1796, ch. XXX, 1 Stat. 469	25
Act of Mar. 3, 1799, ch. XLVI, 1 Stat. 743	25
Act of Mar. 30, 1802, ch. XIII, 2 Stat. 139	25
§ 12, 2 Stat. 143	27
Act of May 6, 1822, ch. LVIII, 3 Stat. 682	25
Act of June 30, 1834, ch. CLXI, 4 Stat. 729	25
§ 1, 4 Stat. 729	27
§ 12, 4 Stat. 730-731	25, 27
§ 29, 4 Stat. 734	27
Act of June 11, 1960, Pub. L. No. 86-505, 74 Stat. 199 (codified at 25 U.S.C. 635(b))	28
Burke Act of 1906, ch. 2348, 34 Stat. 182	4
Consolidated Farmers Home Administration Act of 1961, § 334, 7 U.S.C. 1984	17
Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, § 103(2), 108 Stat. 4791 (reprinted in 25 U.S.C. 479a (note))	13
General Allotment Act of 1887, ch. 119, 24 Stat. 388	2
§ 5, 25 U.S.C. 348	4
§ 6, 25 U.S.C. 349	4, 5
Homestead Act of 1862, ch. LXXV 12 Stat. 392	2
Indian Nonintercourse Act, 25 U.S.C. 177	7, 25, 26

VII

Statutes and regulation—Continued:	Page
Indian Reorganization Act of 1934, 25 U.S.C. 461-494	1
Nelson Act, ch. 24, 25 Stat. 642	2
Pub. L. No. 91-229, 84 Stat. 120:	
§ 1 (codified at 25 U.S.C. 488)	17
§ 5 (codified at 25 U.S.C. 492)	17
Pub. L. No. 100-581, § 213, 102 Stat. 2941	11
Pub. L. No. 101-630, 104 Stat. 4531:	
§ 101(3), 104 Stat. 4531	28
§ 101(5), 104 Stat. 4531	28, 29
§ 102, 104 Stat. 4531	29
Pub. L. No. 102-497, § 4, 106 Stat. 3255	29
18 U.S.C. 1151	28
25 U.S.C. 608(c) (1982)	11
Rev. Stat. § 2116 (1875 ed.)	25
Rev. Stat. § 5596 (1875 ed.)	28
25 C.F.R. 83.2	14
Miscellaneous:	
<i>Felix S. Cohen's Handbook of Federal Indian Law</i> (Rennard Strickland <i>et al.</i> eds., 1982)	27
78 Cong. Rec. 11,125 (1934)	13
61 Fed. Reg. 58,211 (1996)	14
H.R. Rep. No. 474, 23d Cong., 1st Sess. (1834)	27
H.R. Rep. No. 1804, 73d Cong., 2d Sess. (1934)	13
H.R. Rep. No. 1648, 86th Cong., 2d Sess. (1960)	29
H.R. Rep. No. 1353, 96th Cong., 2d Sess. (1980)	26
S. Rep. No. 393, 91st Cong., 1st Sess. (1969)	17
S. Rep. No. 428, 102d Cong., 2d Sess. (1992)	29
The Federalist No. 42, (J. Madison) (J. Cooke ed. 1982)	9
30 Weekly Comp. Pres. Doc. 936 (Apr. 29, 1994)	14

In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-174

CASS COUNTY, MINNESOTA, ET AL., PETITIONERS

v.

LEECH LAKE BAND OF CHIPPEWA INDIANS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE
UNITED STATES AS AMICUS CURIAE
SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

The United States, because of its special relationship with Indian Tribes, has an interest in the preservation of traditional tribal immunities from state or local taxation. Such immunities promote the important federal policies, reflected in numerous Acts of Congress, of tribal self-government and economic self-sufficiency.

STATEMENT

1. Respondent Leech Lake Band of Chippewa Indians ("the Band") is a federally recognized Indian Tribe. It operates under a constitution adopted by the Minnesota Chippewa Tribe and approved by the Secretary of the Interior pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. 461-494. The Leech Lake Reservation was established by the Treaty with the Chippewa Indians, February 22, 1855, 10 Stat. 1165, and was augmented by subsequent treaties and executive orders. The Reservation currently covers an area of 588,684 acres within the

northern Minnesota counties of Cass, Itasca, and Beltrami. See Pet. App. 2-3, 32; *State v. Forge*, 262 N.W.2d 341, 346 (Minn. 1977), appeal dismissed, 435 U.S. 919 (1978); *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F. Supp. 1001, 1002, 1004-1006 (D. Minn. 1971).

In 1889, Congress adopted the Nelson Act, ch. 24, 25 Stat. 642, which is the principal statute at issue here. Section 3 of the Nelson Act provided for the allotment of lands on Minnesota Indian reservations, including the Leech Lake Reservation, to individual tribal members. Those allotments were to be made "in conformity with" the General Allotment Act of 1887, ch. 119, 24 Stat. 388 (also known as the Dawes Act), which generally "empowered the President to allot portions of reservation land to tribal members and, with tribal consent, to sell the surplus lands to white settlers." *DeCoteau v. District County Court*, 420 U.S. 425, 432 (1975). Sections 4 and 5 of the Nelson Act provided for the sale of surplus "pine lands" on the Minnesota reservations for commercial lumbering purposes, and Section 6 provided for the sale of surplus "agricultural lands" to non-Indian settlers pursuant to the Homestead Act of 1862, ch. LXXV, 12 Stat. 392. The Nelson Act, like the General Allotment Act, had two purposes: first, to respond to the "continuing demand for new lands for the waves of homesteaders moving west," and, second, to advance the Indians' "assimilation into American society," which was expected to occur once they "abandon[ed] their nomadic lives on the communal reservations and settle[d] into an agrarian economy on privately owned parcels of land." *Solem v. Bartlett*, 465 U.S. 463, 466 (1984); *State v. Clark*, 282 N.W.2d 902, 905-906 (Minn. 1979), cert. denied, 445 U.S. 904 (1980).¹

¹ The Nelson Act allowed Minnesota Chippewa Indians to take allotments either on the White Earth Reservation or on their own reservations. Most of the Leech Lake Band chose the latter course. Pet.

Between 1980 and 1992, the Band purchased, and thereafter held in fee, 21 parcels of land in the Cass County portion of its Reservation. The parcels originally had been conveyed to individuals, Indian and non-Indian, pursuant to the three types of dispositions provided for in the Nelson Act: 13 of the parcels had been allotted to tribal members under Section 3 of the Act; seven parcels had been sold to non-Indians as commercial pine lands under Sections 4 and 5; and one parcel had been sold to a non-Indian homesteader under Section 6. All of the parcels were held by non-Indians immediately before their reacquisition by the Band. Pet. App. 7-8, 33.

In 1993, after this Court's decision in *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251 (1992), Cass County began levying an ad valorem tax on all of those parcels. Under protest and to avoid foreclosure, the Band paid more than \$64,000 in taxes, interest, and penalties. Pet. App. 8, 33.

2. The Band filed suit in federal district court, seeking a declaration that the properties are exempt from county taxation, injunctive relief against assessment of the taxes, and the refund of all property taxes, interest, and penalties paid to the County. Pet. App. 51-58. The district court dismissed the action on summary judgment. *Id.* at 30-49. In concluding that the Band's land was subject to county taxation, the district court relied primarily on *Yakima*, which held that Indian-owned fee lands allotted under the General Allotment Act were not immune from a county ad valorem tax. The district court construed *Yakima* as having set forth a rule that "if Congress has made Indian land freely alienable, states may tax the land." *Id.* at 37.

App. 7. The courts have recognized, and petitioners have not disputed, that the Leech Lake Reservation "has never been disestablished or diminished" as a result of the Nelson Act or otherwise. *Id.* at 3 (citing *Forge*, 262 N.W.2d at 343-344; *Herbst*, 334 F. Supp. at 1002).

In the alternative, the district court held that, if *Yakima* did not stand for the proposition that "alienability equals taxability" in all circumstances, then only the 13 parcels originally allotted to individual Indians under Section 3 of the Nelson Act would be taxable, because only Section 3 "incorporated the terms of the [General Allotment Act]" that were construed in *Yakima*. Pet. App. 48. The eight parcels that had been disposed of under Sections 4, 5, and 6, which made no reference to the General Allotment Act, could not be taxed by the County under the court's alternative reading of *Yakima*. *Ibid*.

3. The court of appeals affirmed in part and reversed in part. Pet. App. 1-29. As an initial matter, the court read *Yakima* to have reaffirmed the requirement that Congress must make "unmistakably clear" its intent to subject Indian lands to state or local taxation. See *id.* at 14-15 (quoting *Yakima*, 502 U.S. at 258). The court therefore rejected Cass County's argument that Congress automatically subjects Indian lands to state or local taxation simply by making those lands alienable. *Id.* at 12-15.

The court of appeals further read *Yakima* as having found a sufficiently clear expression of congressional intent to allow taxation of Indian allotments in the combination of Sections 5 and 6 of the General Allotment Act, as amended by the Burke Act of 1906, ch. 2348, 34 Stat. 182. Pet. App. 17-21. Section 5 authorized the government to issue a fee patent to an Indian allottee at the expiration of the statutory trust period, and provided that "any conveyance * * * of the lands" or "any contract made touching the same" would be invalid if made before that time. 25 U.S.C. 348. Section 6, as amended by the Burke Act, provided that allottees would be subject to state civil and criminal jurisdiction "[a]t the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee." 25 U.S.C. 349. It also authorized the

Secretary of the Interior to issue a fee patent before the expiration of the trust period if the allottee was competent, at which time "all restrictions as to sale, incumbrance, or taxation of said land shall be removed." 25 U.S.C. 349. The court of appeals concluded that Section 6, as amended by the Burke Act, "is thus the primary source of the requisite clear congressional intent to allow state ad valorem taxes on Indian lands," because Section 6 made clear that Indians could be taxed on their allotted land upon issuance of a fee patent. Pet. App. 19.

The court of appeals thus held that Cass County could tax only those lands that were allotted to individual Indians pursuant to Section 3 of the Nelson Act (which incorporated the General Allotment Act) and that were patented after the Burke Act proviso was adopted in 1906 (which made clear Congress's intent to allow taxation). Pet. App. 22-23. The court further held that the County could not tax the eight parcels of land that were sold as pine lands or homestead lands under Sections 4, 5, and 6 of the Nelson Act, because those sections "did not incorporate the [General Allotment Act] or include any mention of an intent to tax lands distributed under them which might become reacquired by the Band." *Id.* at 22.

The dissent viewed *Yakima* as holding that "alienability of land allows taxation of land." Pet. App. 28. The dissent therefore concluded that, "[b]ecause all of the lands in this case are fully alienable by the Band," all of the lands should be subject to taxation. *Id.* at 28-29.

SUMMARY OF ARGUMENT

This Court has consistently held that a State may not tax a Tribe or its members with respect to activities or property within the Tribe's reservation unless Congress has authorized the tax with unmistakable clarity. That rule reflects both the United States' preeminent role over relations with the Tribes, as mandated by the Constitu-

tion, and the sovereignty retained by the Tribes even after the formation of the United States. That rule applies with special force where, as here, a State or its political subdivision would tax reservation lands owned by a Tribe itself—a “domestic dependent nation[]” that exercise[s] inherent sovereign authority over [its] members and territory.” *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) (quoting *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831)). A State should not be permitted to tax, and thus potentially to destroy, *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819)), a parallel sovereign except upon the clearest evidence that Congress has considered, and specifically consented to, such taxation.

No such evidence exists here. Congress has never expressed any intent to allow the Leech Lake Band, or even its individual members, to be taxed on the eight parcels of land at issue here. Petitioners concede as much. They contend, however, that this Court in *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251 (1992), abandoned, sub silentio, its venerable clear statement rule, and replaced it with a new rule that allows Tribes and individual Indians to be taxed on any lands that they may freely alienate. The Court adopted no such rule in *Yakima*. Instead, the Court followed what it recognized to be its “consistent practice of declining to find that Congress has authorized state taxation unless it has made its intention to do so unmistakably clear,” *id.* at 258 (internal quotation marks omitted), and concluded that the General Allotment Act, as amended, constituted a clear expression of congressional intent to allow the taxation of lands allotted to individual Indians for which fee patents had issued, *id.* at 258-259. The court of appeals thus correctly recognized that Cass County could not, under this Court’s decisions including

Yakima, tax tribally owned reservation lands whose taxability in Indian hands was never addressed by Congress.

In any event, even if the Court were to adopt petitioners’ rule that “alienability equals taxability,” the lands at issue here would not be taxable, because they are not freely alienable. The Indian Nonintercourse Act, 25 U.S.C. 177 (INA)—which requires congressional consent to the “purchase” or “other conveyance” of tribally owned lands—restricts the Band’s ability to alienate those lands. Congress and the Executive Branch have recognized that the INA applies to all reservation lands held by a Tribe, including lands recently acquired in fee, and thus that a Tribe cannot dispose of such lands without permission from Congress.

ARGUMENT

I. CONGRESS HAS NOT GIVEN THE REQUISITE CONSENT TO STATE TAXATION OF TRIBALLY OWNED RESERVATION LANDS THAT WERE ACQUIRED BY NON-INDIANS UNDER THE NELSON ACT BUT LATER REACQUIRED BY THE BAND

A. A State Cannot Tax Tribally Owned Lands On A Reservation Unless Authorized By Congress With Unmistakable Clarity

1. This Court has long recognized that “Indian tribes and individuals generally are exempt from state taxation within their own territory.” *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764 (1985); see *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987) (observing “that the federal tradition of Indian immunity from state taxation is very strong and that the state interest in taxation is correspondingly weak”). The States and their political subdivisions are thus “without power to tax reservation lands and reservation Indians,” except in those rare instances in which Congress has per-

mitted them to do so. *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 258 (1992); see *Blackfeet Tribe*, 471 U.S. at 765 (noting that Congress "has not done so often").

Congress will not be deemed to have authorized any exception to the general rule of Indian immunity from state taxation "unless it has 'made its intention to do so unmistakably clear.'" *Yakima*, 502 U.S. at 258 (quoting *Blackfeet Tribe*, 471 U.S. at 765). And any statute claimed to confer such authority will be "construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Blackfeet Tribe*, 471 U.S. at 766; see *Yakima*, 502 U.S. at 269 (noting that this principle is "deeply rooted in this Court's Indian jurisprudence"). The requirement that Congress must articulate—expressly, clearly, and unambiguously—any intent to allow state taxation of Tribes and their members in Indian country is a venerable one. See, e.g., *Choate v. Trapp*, 224 U.S. 665, 675 (1912) (although ordinarily "tax exemptions are strictly construed," the rule with respect to Indians "is exactly the contrary," so that "[t]he construction * * * is liberal" and "doubtful expressions * * * are to be resolved in [the Indians'] favor"). It has been reiterated, and applied, by the Court "consistent[ly]" to this day. *Yakima*, 502 U.S. at 258; see, e.g., *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 123-124 (1993); *Bryan v. Itasca County*, 426 U.S. 373, 392-393 (1976).

The general rule of Indian immunity from state taxation, and the corollary that exceptions to that rule must be clearly authorized by Congress, derive from two sources: the federal government's "exclusive authority over relations with Indian tribes," and the Tribes' sovereignty within their own territories and over their own members. *Blackfeet Tribe*, 471 U.S. at 764; accord *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 168-169 (1973).

See also *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980) (noting that Congress's "broad power to regulate tribal affairs" and "the semi-independent position of Indian tribes" constitute "two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members") (internal quotation marks omitted).

The Constitution grants Congress alone the power "[t]o regulate Commerce * * * with the Indian Tribes." Art. I, § 8, Cl. 3. The Indian Commerce Clause represents a deliberate repudiation by the Framers of the ambiguous and divided authority over Indian affairs that existed under the Articles of Confederation, which granted Congress "the sole and exclusive right of regulating the trade" and "managing all * * * affairs" with the Tribes, *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) but preserved "the legislative right of any State within its own limits." The Federalist No. 42, at 284 (J. Madison) (J. Cooke ed. 1982); see *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 558-561 (1832). So, too, the Constitution confers on the President, with the advice and consent of the Senate, the power to make treaties (Art. II, § 2, Cl. 2), and "by declaring treaties already made * * * to be the supreme law of the land, * * * admits [the Indian nations'] rank among those powers who are capable of making treaties." *Worcester*, 31 U.S. (6 Pet.) at 559. Against this background, the Court held in *Worcester* that "[t]he Cherokee nation * * * is a distinct community, occupying its own territory, * * * in which the laws of Georgia can have no force." *Id.* at 561.

Although *Worcester* concerned state criminal jurisdiction over Indian lands, "the rationale of the case plainly extended to state taxation within the reservation as well." *McClanahan*, 411 U.S. at 169. Accordingly, in *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867), the Court

held that Indian lands held in severalty or in common were exempt from state taxation. The Court explained that "[i]f the tribal organization of the Shawnees is preserved intact, and recognized by the political department of the government as existing, then they are a 'people distinct from others,' * * * separated from the jurisdiction of Kansas, and to be governed exclusively by the government of the Union." *Id.* at 755. The Court likewise invalidated state taxes on reservation land owned by a Tribe in fee in *The New York Indians*, 72 U.S. (5 Wall.) 761 (1867), terming the taxes and related provisions "an unwarrantable interference, inconsistent with the original title of the Indians, and offensive to their tribal relations." *Id.* at 771.

The Court has continued to recognize the vitality of the principles of federal authority and tribal sovereignty expressed in the early Indian tax immunity cases. *Blackfeet Tribe*, 471 U.S. at 765; *McClanahan*, 411 U.S. at 169. The Court has applied those principles in holding that States may not tax the income of Indians living on a reservation (*McClanahan*, 411 U.S. at 165-166) or in other forms of Indian country (*Sac and Fox Nation*, 508 U.S. at 124-126); Indian-owned vehicles, mobile homes, and other personal property within Indian country (*id.* at 126-128; *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 162-164 (1980); *Bryan*, 426 U.S. at 378-393; *Moe v. Salish and Kootenai Tribes*, 425 U.S. 463, 480-481 (1976); and reservation sales and purchases by tribal members (*Moe*, 425 U.S. at 480-481); *Colville*, 447 U.S. at 160; *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991); *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 453 (1995)).

2. The requirement that Congress speak with unmistakable clarity in order to abrogate Indian immunity from state taxation has special force where, as here, a State or its political subdivision seeks to tax either the Tribe itself

or the Tribe's own property or activities within its reservation. That is because state taxation of tribal governments—which "exercise inherent sovereign authority over their members and territories," *Potawatomi Indian Tribe*, 498 U.S. at 509—implicates principles of intergovernmental tax immunity in a manner that state taxation of individual Indians does not.²

Under the intergovernmental tax immunity doctrine, "the States can never tax the United States directly," *South Carolina v. Baker*, 485 U.S. 505, 523 (1988), absent express authorization by Congress. The doctrine also precludes the federal government, in many circumstances, from directly taxing the States. *Ibid.* While the tax immunity of the federal government derives from the Supremacy Clause, the tax immunity of the States derives from "the constitutional structure and a concern for protecting state sovereignty." *Id.* at 518 n.11. A State's direct taxation of a tribal government raises similar concerns, given the Tribes' position in the constitutional structure and the strong federal interest in protecting

² This Court's modern decisions in this area have usually involved state taxes imposed not on Tribes, but on individual Indians. To be sure, *Yakima* was a suit by a Tribe for declaratory and injunctive relief, "contending that federal law prohibited [county ad valorem] taxes on fee-patented lands held by the Tribe or its members." 502 U.S. at 256. The Tribe did not urge any distinction in the analysis to be applied to the two categories of land, perhaps because the suit was prompted by the county's threat to foreclose on those parcels that were held by individual Indians. See Resp. Br. at 9, *Yakima*, No. 90-408 ("Tribal members owning and living on fee lands within the reservation was at the root of this present controversy."). Nor did the United States focus on any such distinction in its brief as amicus curiae, perhaps because, as that brief pointed out (at 24), a special statute applicable to the Tribe provided (until its amendment in 1988, see Pub. L. No. 100-581, § 213, 102 Stat. 2941,) that land acquired for the Tribe in fee "shall not, by reason of its being owned by the tribes, be exempt from taxation in accordance with the laws of the State of Washington." See 25 U.S.C. 608(c) (1982).

tribal sovereignty and promoting the economic self-sufficiency that is vital to tribal self-government.

We do not, of course, suggest that Tribes are identical to States for purposes of the intergovernmental tax immunity doctrine. Most significantly, because of Congress's plenary power over Indian affairs, Congress may authorize the States to tax Indian Tribes, *Yakima*, 502 U.S. at 258, even though Congress may not be able to subject a State to taxation by another sovereign in comparable circumstances. The Court has, however, made clear that "the tribes have retained a semi-independent position . . . not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided." *White Mountain Apache Tribe*, 448 U.S. at 142 (internal quotation marks omitted); see *Potawatomi Indian Tribe*, 498 U.S. at 509 ("Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories") (quoting *Cherokee Nation*, 30 U.S. (5 Pet.) at 17); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140-142 (1982) (Indian Tribes "are unique aggregations possessing attributes of sovereignty over both their members and their territory") (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975)). It would seem to follow that a central attribute of the retained sovereignty of a Tribe—like that of the United States and the States—is the presumptive immunity of the Tribe and its property, within its own territory, from taxation by another sovereign.

The Court has further recognized that the federal government has a strong "substantive interest" in promoting "tribal self-government." *Moe*, 425 U.S. at 469 n.7; accord *Cabazon Band*, 480 U.S. at 216. While Congress at

the time of the General Allotment Act pursued an assimilationist policy designed to "put an end to tribal organization" and to "dealings with Indians * * * as tribes," *United States v. Celestine*, 215 U.S. 278, 290 (1909), Congress "repudiated" that policy with the Indian Reorganization Act of 1934. *Moe*, 425 U.S. at 479 (internal quotation marks omitted). That Act did not simply end the allotment process. It also sought to reinvigorate tribal relations, enhance the authority of tribal governments within their reservations, restore the national policy of dealing with the Indians as Tribes, "rehabilitate the Indian's economic life," and "give the Indians the control of their own affairs and of their own property." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess. 6 (1934) and 78 Cong. Rec. 11,125 (1934) (statement of Sen. Wheeler)). The immunity of a Tribe and its reservation property from state taxation serves to ensure that the Tribe can fully devote its resources to the maintenance of the tribal government and the fostering of economic self-sufficiency.³

Congress and the Executive Branch have remained cognizant of the importance of tribal sovereignty. Congress, for example, recently reaffirmed the sovereign status of Tribes in the Federally Recognized Indian Tribe List Act of 1994, stating that "the United States has a trust responsibility to recognized Indian tribes, maintains a government-to-government relationship with those tribes, and recognizes the sovereignty of those tribes." Pub. L. No. 103-454, § 103(2), 108 Stat. 4791 (reprinted in 25 U.S.C. 479a note). The regulations implementing that Act

³ Cf. *Chickasaw Nation*, 515 U.S. at 464-465 (reserving question whether state income tax on tribal members who live outside Indian country but who are employed by the Tribe would constitute an impermissible interference with tribal self-government); *Sac and Fox*, 508 U.S. at 126 (same).

make clear that recognition entitles a Tribe to "the immunities and privileges available to * * * federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States." 61 Fed. Reg. 58,211 (1996) (quoting 25 C.F.R. 83.2). And President Clinton, like his recent predecessors, has issued a Memorandum on Government-to-Government Relations With Native American Tribal Governments expressing the federal government's commitment to tribal sovereignty. 30 Weekly Comp. Pres. Doc. 936 (Apr. 29, 1994).

Accordingly, although Tribes do not possess all of the attributes of sovereignty possessed by States or independent nations, see *White Mountain Apache Tribe*, 448 U.S. at 142, Tribes are recognized to be governments under the Constitution, this Court's decisions, and modern federal policy. It is thus appropriate that the intergovernmental tax immunity doctrine operate as a distinct constraint on the States' ability to tax tribal governments or their property. In view of the federal government's constitutionally exclusive authority over relations with the Tribes and its strong interest in protecting tribal sovereignty, a suitable constraint is to bar the States from taxing a tribal government, at least as to activities or property within its reservation, unless Congress has specifically consented to the taxation of the Tribe itself, and not simply of individual Indians. Such a rule will assure that Congress has considered, and deliberately chosen, to permit such a significant state encroachment on tribal sovereignty. See *Yakima*, 502 U.S. at 258 (observing that "the power to tax involves the power to destroy") (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819)).⁴

⁴ A similar distinction exists in the area of tribal sovereign immunity, a doctrine that applies only to the Tribes themselves, and not to their individual members. See, e.g., *Potawatomi Indian Tribe*,

B. Congress Has Not Authorized The State Or Its Political Subdivision To Tax The Band On The Lands At Issue Here

Nothing in the Nelson Act, the General Allotment Act, or any other Act of Congress authorizes the State of Minnesota or its political subdivisions to tax the Leech Lake Band on any of its tribally owned reservation lands. The Nelson Act, when read together with the General Allotment Act, authorized only the taxation of individual Indians on their privately owned lands. We submit that Congress's silence as to the taxability of tribally owned lands should end the Court's inquiry here. If petitioners wish to tax tribally owned reservation lands, they must obtain express authorization to do so from Congress.

The Nelson Act likewise says nothing about the taxability, whether in individual Indian or tribal hands, of the particular properties that remain at issue at this stage of the case, i.e., the eight parcels that were originally sold to non-Indians as pine lands or homestead lands under Sections 4, 5, and 6 of the Nelson Act. Nor has Congress on any other occasion authorized the State or its political subdivisions to tax those lands if restored to Indian ownership. Petitioners concede as much. See Br. 11 (acknowledging "the absence of express statutory language" permitting taxation of those lands). Accordingly, even if one assumes (contrary to our argument above) that Congress's grant of authority for States to tax individual Indians also constitutes authority to tax the Tribes themselves, Congress has not granted such authority here. Much less has Congress spoken with the unmistakable

498 U.S. at 509-510. Although "Congress has always been at liberty to dispense with such tribal immunity or to limit it," *id.* at 510, Congress has done so only "occasionally," and with specific reference to Tribes. *Ibid.* See generally U.S. Amicus Br. 15-25, *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, No. 96-1037 (argued Jan. 12, 1998).

clarity required by this Court's precedents. See *Yakima*, 502 U.S. at 258.

Petitioners argue (Br. 23) that Congress cannot be expected to have addressed the taxability of the pine lands and the homestead lands, because Congress "naturally presumed" that those lands would be "sold to non-Indian purchasers" who would be subject to state taxation, and that the lands would not be reacquired by the Band. But congressional silence cannot be equated with congressional consent to taxation in the event (however unlikely) that the Band did reacquire the lands. To do so would contravene this Court's clear statement rule.⁵ Moreover, while Congress may have assumed during the allotment era that Tribes and tribal land ownership would soon be a thing of the past, see *Solem v. Bartlett*, 465 U.S. 463, 468 (1984), any such assumption has long since been discredited. Yet, Congress still has not acted to authorize state taxation of lands, such as those here, that a Tribe once sold to the United States for resale to non-Indians but later reacquired in fee. Cf. *Bryan*, 426 U.S. at 389 n.14 ("courts are not obligated in ambiguous instances to strain to implement [an assimilationist] policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship") (internal quotation marks omitted) (brackets in original).

Indeed, Congress has understood that reservation lands reacquired by a Tribe, whether in fee or in trust, are not generally subject to state or local property taxation. In 1970, Congress authorized the Farmers Home Administration to make loans to Tribes and tribal corporations to

⁵ Congress doubtless also assumed that the lands would not be reacquired by the United States. But Congress's silence as to the State's authority to tax the land in the hands of the federal government obviously cannot be construed as authority to do so.

"acquire lands or interests therein within the tribe's reservation." Pub. L. No. 91-229, § 1, 84 Stat. 120 (codified at 25 U.S.C. 488). At the same time, Congress specifically exempted Tribes and tribal corporations from Section 334 of the Consolidated Farmers Home Administration Act of 1961, as amended, which states that "[a]ll property subject to a lien held by the United States * * * shall be subject to taxation by State, territory, district, and local political subdivisions in the same manner and to the same extent as other property is taxed." 7 U.S.C. 1984. Specifically, Congress provided that Section 334 "shall not be construed to subject to taxation any lands or interests therein while they are held by an Indian tribe or tribal corporation or by the United States in trust for such tribe or tribal corporation." § 5, 84 Stat. 120 (codified at 25 U.S.C. 492). Of course, if Congress had understood that lands reacquired by a Tribe in fee were already subject to state and local property taxation, that provision would have served no purpose.⁶

C. This Court Has Not Adopted A Rule That "Alienability Equals Taxability" Of Tribally Owned Reservation Lands

Petitioners argue that no express congressional authorization is required to tax the Band on the pine lands and homestead lands that it reacquired on the Leech Lake Reservation. They contend (Br. 13-15) that *Yakima* aban-

⁶ While the measure was pending before the Senate Committee on Interior and Insular Affairs, the Bureau of the Budget asked the Committee to consider whether "there is a real need to provide tax exemptions in this case." S. Rep. No. 393, 91st Cong., 1st Sess. 6 (1969). The Bureau reasoned that "the ability to purchase, manage, and mortgage property, which is assumed in this legislation, strongly suggests the existence of an ability to meet the other obligations of property ownership usually associated with fee title." *Ibid.* The bill ultimately reported by the Committee and passed by Congress nonetheless contained the "tax exemptions" provision.

done the rule that States may not tax Tribes or their members in Indian country unless Congress has clearly authorized them to do so, and instead adopted a rule, supposedly derived from *Goudy v. Meath*, 203 U.S. 146 (1906), that States may always tax alienable lands held by Tribes or their members unless Congress has clearly prohibited them from doing so. But *Yakima* does not rest on any rule that Indian property is taxable by the States so long as it is alienable. Moreover, even assuming *arguendo* that *Goudy* rested on such a rule, that case did not involve tribally owned reservation lands, to which its rationale is unpersuasive. And this Court has declined since *Goudy* to equate the alienability of Indian property with its taxability by the States.

1. In *Yakima*, the Court concluded that the General Allotment Act, as amended by the Burke Act, provided a sufficiently clear expression of congressional intent to allow lands allotted to Indians under that Act to be subject to ad valorem taxation by the States or their political subdivisions. The Court did not, as petitioners suggest, abandon the longstanding rule that Congress must expressly authorize state taxation of Tribes and reservation Indians. To the contrary, the Court embraced that rule. The Court recognized that its “cases reveal a consistent practice of declining to find that Congress has authorized state taxation unless it has ‘made its intention to do so unmistakably clear.’” *Yakima*, 502 U.S. at 258 (quoting *Blackfeet Tribe*, 471 U.S. at 765).

The Court then applied that rule in holding that Section 6 of the General Allotment Act, as amended by the Burke Act, clearly reflected a congressional intent to permit state ad valorem taxation of the allotted lands. See *Yakima*, 502 U.S. at 258-259. The Court reasoned that “by specifically mentioning immunity from land taxation as one of the restrictions that would be removed upon con-

veyance in fee, Congress in the Burke Act proviso manifest[ed] a clear intention to permit the state to tax such Indian lands.” *Id.* at 259 (internal quotation marks omitted). The Court thus concluded that “express authority for taxation of fee-patented land is found in § 6 of the General Allotment Act, as amended.” *Id.* at 258. The Court’s references to Congress’s “specifically mentioning” taxation of fee lands, “manifest[ing] a clear intention” to allow taxation, and providing “express authority for taxation” refute petitioners’ interpretation of *Yakima*. It is evident that the Court’s decision rested principally on Section 6 of the General Allotment Act, as amended by the Burke Act, which specifically addressed the taxability of the allotted lands. It was not based on the alienability of the lands alone.

Petitioners’ interpretation of *Yakima* is further undermined by Section III of the Court’s opinion, which determined that, while the General Allotment Act authorized an ad valorem tax on the allotted lands, it did not also authorize an excise tax. See *Yakima*, 502 U.S. at 266-270. The Court reasoned that Congress expressly permitted the ad valorem tax, which “constitutes ‘taxation of . . . land’ within the meaning of the General Allotment Act,” as amended by the Burke Act proviso. *Id.* at 266-267. But the Court held that an excise tax does not clearly constitute “taxation of * * * land” as authorized by that proviso. Applying the “principle deeply rooted in this Court’s Indian jurisprudence” of construing ambiguous provisions to the benefit of Indians, the Court concluded that “[t]he short of the matter is that the General Allotment Act explicitly authorizes only ‘taxation of . . . land,’ not ‘taxation with respect to land,’ ‘taxation of transactions involving land,’ or ‘taxation based on the value of land.’” *Id.* at 269. It was thus the General Allotment Act’s express language, “taxation of * * *

land," that was determinative for the Court in *Yakima*, not the mere alienability of the land. See Pet. App. 13 ("If alienability always equals taxability, it should be the nature of the property right, not the nature of the tax, that matters. If that were the rule, the Court should have upheld both the ad valorem and the excise taxes.").⁷

2. Petitioners' confusion over *Yakima*'s holding presumably arises from the fact that "[n]either the Yakima Nation nor its principal *amicus*, the United States, vigorously disput[ed]" that Section 6 of the General Allotment Act, as amended, constituted a clear expression of congressional intent at the time to allow state ad valorem taxation of each individual allotment once a fee patent had issued, by removing the special protection from taxation that the General Allotment Act itself had imposed on that allotment. 502 U.S. at 259; see also *id.* at 266 ("the Tribe does not dispute * * * that this ad valorem tax constitutes 'taxation of . . . land' within the meaning of the General Allotment Act and is therefore *prima facie* valid"). The Court thus did not dwell at length on the issue. The Court instead focused on the Tribe's and the United States' arguments that "§ 6 of that Act—the Burke Act proviso included—is a dead letter" in view of subsequent developments in federal Indian policy. *Id.* at 259-260. It was in that context that the Court principally discussed *Goudy v. Meath*, an early case that held that

⁷ A further indication that *Yakima* did not adopt a rule that alienability equals taxability is the Court's remand in that case to determine "whether the parcels at issue * * * were patented under the General Allotment Act, rather than under some other statutes," and, if so, "whether it makes any difference." 502 U.S. at 270. No such remand would have been necessary had the Court meant to equate alienability with taxability in all circumstances, whether or not the statute under which the lands were patented contained a clear statement of congressional intent to permit taxation. The mere fact that the lands had been "patented" in fee, under *any* statute, would have sufficed to render them taxable.

land allotted to an Indian in fee was taxable because, among other things, the land was alienable.

The Tribe and the United States argued in *Yakima* that the County was precluded from taxing the allotted fee lands under the Court's decision in *Moe*, which declined to apply the grant of personal jurisdiction in Section 6 of the General Allotment Act beyond the original Indian allottees. *Moe* had concluded that Section 6 could not be read as authorizing personal jurisdiction over subsequent Indian owners, given "the many and complex intervening jurisdictional statutes directed at the reach of state law within reservation lands." 425 U.S. at 479. The Court determined in *Yakima* that those intervening statutes did not address the taxability of lands allotted to Indians under the General Allotment Act. See 502 U.S. at 264.

The Court thus concluded that the *result* of *Goudy*—*i.e.*, that an Indian is subject to state property taxes on allotted lands for which he has received a fee patent—was not undermined by *Moe* and the post-allotment statutes on which it relied. But the Court did not also conclude that the *rationale* of *Goudy* retains its vitality to the extent that it equated alienability with taxability—a conclusion that would have been contrary to what the Court understood to be its "consistent practice" of requiring an "unmistakably clear" expression of Congress's intent to authorize state taxation of Indians. *Yakima*, 502 U.S. at 258 (internal quotation marks omitted). The Court recognized that no such clear statement was provided by Section 5 of the General Allotment Act, the provision under which the lands in *Yakima* had been made alienable. Section 5 merely "implied" that the fee-patented lands would be subject to state property taxes. *Id.* at 264. It required "[t]he Burke Act proviso, enacted in 1906," to make "this implication of § 5 explicit, and its nature more clear." *Ibid.* Nothing in the Court's opinion suggests that

the taxability of the lands in *Yakima* would have been sustained without that "explicit" statement.

3. Contrary to petitioners' suggestions (Br. 10, 11-13), moreover, *Goudy* itself did not rest solely on the proposition that alienability, without more, was sufficient to permit taxation of the land at issue there. The Court based its decision on multiple rationales, no one of which was described as being independently sufficient.

One of those rationales is consistent with the clear statement rule subsequently enunciated by this Court in its Indian taxation cases. The Indian in *Goudy* had received his allotment under an 1854 treaty, which provided that the land "shall not be aliened, or leased for a longer term than two years," and "shall be exempt from levy, sale, or forfeiture" until the state legislature "remove[d] the restrictions" and Congress gave its consent. 203 U.S. at 147. The State adopted a statute in 1890 that purported to remove "all restrictions" on the land. *Ibid.* Congress gave its consent in 1893, albeit without specifically mentioning taxation. *Id.* at 147-148. The Court concluded, in light of the 1854 treaty language, that the restrictions had thereby been lifted, both on "voluntary alienation" (e.g., sale or lease) and on "involuntary alienation" (e.g., "any action or omission which in due course of law results in forced sale"). *Id.* at 149-150. Under this rationale, the Indian's land was taxable not because he could freely dispose of it, but because Congress had consented to the State's removal of all restrictions on the land, and thereby removed the prohibition against "levy" (i.e., taxation). Cf. *The Kansas Indians*, 72 U.S. (5 Wall.) at 760-761.

The other *Goudy* rationale, relied upon by petitioners here, retains little persuasive force, especially as to tribally owned reservation lands (which were not involved in *Goudy*). Assuming that the only reason for exempting

an individual Indian's land from alienation or taxation was "protection of the Indian from the cunning and rapacity of his white neighbors," *Goudy* reasoned that "it would seem strange" for Congress to have sought to protect the Indian only from state officials, and not from others who might seek to separate him from his lands. 203 U.S. at 149. But there is another reason, since the enactment of the Indian Reorganization Act, to exempt tribally owned reservation lands from state taxation: the federal policy of promoting tribal sovereignty and economic development. It thus would not be at all "strange" for Congress to make such lands alienable but not taxable.⁸

4. Just six years after *Goudy*, this Court made clear that restrictions on alienation and exemptions from taxation are logically and legally distinct, i.e., that the alienability of Indian lands does not automatically render them taxable by the States. In *Choate v. Trapp*, 224 U.S. 665 (1912), the Court held that Indian allottees had a constitutionally protected property right to a tax exemption during the originally prescribed trust period, and therefore that the tax exemption could not be terminated without their consent despite the government's lifting of restrictions on alienation.⁹ The Court explained that

the exemption and nonalienability were two separate and distinct subjects. One conferred a right and the

⁸ As discussed in Part II, *infra*, moreover, the Band's tribally owned reservation lands are not freely alienable, as a result of the Indian Nonintercourse Act.

⁹ The Court reasoned that the Indians had bargained for a tax exemption for the duration of the trust period, and therefore had been granted a property right that could not be taken without their consent. *Choate*, 224 U.S. at 674-679. The holding that the tax exemption was a constitutionally protected property right during the trust period obviously does not apply to the fee lands in this case. But *Choate* illustrates the significant legal distinction between alienability and taxability.

other imposed a limitation. * * * The right to remove the restriction was in pursuance of the power under which Congress could legislate as to the status of the ward and lengthen or shorten the period of disability. But the provision that the land should be non-taxable was a property right, which Congress undoubtedly had the power to grant.

Id. at 673; accord *Carpenter v. Shaw*, 280 U.S. 363, 366-368 (1930).¹⁰

The Court's recent decisions confirm that alienability, without more, does not render Indian property subject to state taxation. If mere alienability were the touchstone, then the Court's decisions in *Sac and Fox Nation, Colville, Bryan*, and *Moe* would have been otherwise, given that the motor vehicles, mobile home, and other personal property held not to be taxable in those cases were doubtless alienable. See *Sac and Fox Nation*, 508 U.S. at 126-128 (post-*Yakima* decision); *Colville*, 447 U.S. at 162-164; *Bryan*, 426 U.S. at 378-393; *Moe*, 425 U.S. at 480-481.

¹⁰ *Mahnomen County v. United States*, 319 U.S. 474 (1943), cited by the amici Counties (at 15-16), is consistent with *Choate* and subsequent cases on Indian tax immunity. In *Mahnomen*, the Court held that an Indian allottee was liable for state taxes because she had voluntarily paid them. 319 U.S. at 479-480. Although amici make much of the Court's statement that "[i]t is conceded that any limitation on the County's power to tax expired in 1928 with the termination of the twenty-five year trust described below," *id.* at 475, the Court found the requisite congressional intent to allow taxation in the specific language of the statute: "The Clapp Amendment gives the consent of the United States to state taxation, thus removing the barrier to taxation found to exist in *United States v. Rickert*, [188 U.S. 432 (1903)]; but under *Choate v. Trapp* the Indian, who has gained a 'vested right' not to be taxed, must also consent." 319 U.S. at 476-477. Furthermore, the land at issue in *Mahnomen County* was owned by an individual allottee, not the Tribe itself, and the tax years in question preceded the enactment of the Indian Reorganization Act in 1934.

II. THE BAND'S TRIBALLY OWNED LANDS ARE NOT ALIENABLE, AND THUS ARE NOT TAXABLE IN ANY EVENT, AS A RESULT OF THE INDIAN NONINTERCOURSE ACT

There is an additional reason why, even under the "alienability equals taxability" rule urged by petitioners, the lands at issue here are not subject to taxation. Petitioners' argument rests on the mistaken premise that those tribally owned reservation lands are freely alienable by the Band. In fact, the Band is constrained by the Indian Nonintercourse Act, 25 U.S.C. 177 (INA), from disposing of its lands without congressional consent.¹¹ No such consent has been granted with respect to the lands here.

Beginning in 1790, Congress enacted a series of laws, pursuant to its broad constitutional authority "to regulate commerce * * * with the Indian tribes" and over Indian affairs generally, that were aimed at controlling trade between Indians and non-Indians and protecting Indian lands from fraudulent purchase or conveyance.¹² The INA is one of those laws. See Act of June 30, 1834, ch. CLXI, § 12, 4 Stat. 730, reenacted as Rev. Stat. § 2116 (1875 ed.) (adopting INA in its current form). As currently codified, the INA provides, in pertinent part:

No purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or

¹¹ All "laws which have been or may be enacted by Congress, regulating trade and intercourse with the Indian tribes," were made applicable to the Leech Lake Reservation by the Treaty with the Chippewas, February 22, 1855, Art. VII, 10 Stat. 1169.

¹² See Act of July 22, 1790, ch. XXXIII, 1 Stat. 137; see also Act of Mar. 1, 1793, ch. XIX, 1 Stat. 329; Act of May 19, 1796, ch. XXX, 1 Stat. 469; Act of Mar. 3, 1799, ch. XLVI, 1 Stat. 743; Act of Mar. 30, 1802, ch. XIII, 2 Stat. 139; Act of May 6, 1822, ch. LVIII, 3 Stat. 682; Act of June 30, 1834, ch. CLXI, 4 Stat. 729.

equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

25 U.S.C. 177. See *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 240 (1985) ("the Nonintercourse Acts simply 'put in statutory form what was or came to be the accepted rule—that the extinguishment of Indian title required the consent of the United States'").

The INA has been described as "perhaps the most significant congressional enactment regarding Indian lands." *United States ex rel. Santa Ana Pueblo v. University of New Mexico*, 731 F.2d 703, 706 (10th Cir.), cert. denied, 469 U.S. 853 (1984); see H.R. Rep. No. 1353, 96th Cong., 2d Sess. 15 (1980) ("One of the most important federal protections is the restriction against alienation of Indian lands without federal consent.") (referencing INA in discussion of Maine Indian Claims Settlement Act). The INA's "overriding purpose is the protection of Indian lands," which is achieved by "impos[ing] on the federal government a fiduciary duty to protect th[ose] lands." *Santa Ana Pueblo*, 731 F.2d at 706. While the particular justifications for the INA's restraints on the alienation of tribally owned lands have changed over time, the need for such restraints remains:

Today, the statutory restraints on alienation of Indian land insulate Indian lands from the full impact of market forces, preserving the Indian land base for the furtherance of Indian values. If tribal land were not subject to restraints on alienation and tax immunities, market forces and state tax assessors would eventually erode Indian ownership of the reservation. * * * The continued enforcement of federal restrictions, in this view, derives not from a presumed incompetence of the "ward," but from a perceived value in the desirability of a separate Indian culture and polity.

Felix S. Cohen's Handbook of Federal Indian Law 509-510 (Rennard Strickland et al. eds., 1982).

The INA, by its terms, does not distinguish between lands held in fee by the Tribe and lands held in trust by the United States. See *United States v. Candelaria*, 271 U.S. 432, 442 (1926) (INA applies to lands of New Mexico Pueblo Indians even though they have "full title to their lands"); 18 Op. Att'y Gen. 235, 237 (1885). Nor does the INA distinguish among lands based on how or when the Tribe acquired them. See *Tonkawa Tribe of Oklahoma v. Richards*, 75 F.3d 1039, 1045 (5th Cir. 1996) (INA "protects a tribe's interest in land whether that interest is based on aboriginal right, purchase, or transfer from a state"); *Tuscarora Indian Nation v. Federal Power Comm'n*, 265 F.2d 338, 339 (D.C. Cir. 1958) ("It makes no difference [to the applicability of the INA] how title to the land may have been acquired by the tribe."), rev'd on other grounds, 362 U.S. 99 (1960); *Alonzo v. United States*, 249 F.2d 189, 196 (10th Cir. 1957) ("the restrictions against alienation [in the INA] apply to lands acquired by the Pueblo through purchase, as well as to lands acquired by the Pueblo in any other manner"), cert. denied, 355 U.S. 1940 (1958).¹³

¹³ This case is concerned only with tribally owned lands on a reservation, where the INA serves to preserve the tribal land base. The Court therefore need not consider whether the INA also applies to tribal fee lands outside of Indian country.

The substantive provisions of the 1834 Act—presumably including Section 12, 4 Stat. 730-731, which enacted the INA in its current form—were intended to apply to "Indian country," as defined in Section 1 of that Act, 4 Stat. 729. See *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667-668 (1979) (quoting H.R. Rep. No. 474, 23d Cong., 1st Sess. 10 (1834)). By contrast, the predecessor INA provision, in Section 12 of the Act of March 30, 1802 (ch. XIII, 2 Stat. 143), had applied to all lands of Indian tribes "within the bounds of the United States." (Although Section 29 of the 1834 Act, 4 Stat. 734, repealed the 1802 Act, it further provided that the repeal did not "impair or affect" the 1802 Act "so far as the same relates to or concerns Indian tribes residing east of the Mississippi.") The definition of "Indian country" in Section 1 of the 1834

Congress, too, has recognized that the INA applies to lands, such as those here, that a Tribe acquired in fee by purchase from a non-Indian owner. Accordingly, when Congress has determined that such lands should be freely alienable by the Tribe, Congress has expressly so provided. In 1960, for example, Congress authorized the sale of fee lands owned by the Navajo Tribe. Act of June 11, 1960, Pub. L. No. 86-505, 74 Stat. 199 (codified at 25 U.S.C. 635(b)). Congress did so precisely because the Tribe would otherwise have been constrained by the INA from disposing of those lands without congressional approval:

The Navajo Tribe has acquired in recent years with its own funds approximately 100,000 acres in fee simple. Under the provisions of Revised Statutes 2116 (25 U.S.C. 177), it appears that no one can safely acquire these lands by purchase or otherwise without the consent of the United States. This, of course, operates as a limitation on the power of the tribe to dispose of them as it sees fit. The committee believes that this disability should be removed in the case of the Navajo Tribe and that it should be free to manage its fee simple lands as it wishes.

Act was omitted from the Revised Statutes and therefore repealed, see *Wilson*, 442 U.S. at 668 (citing Rev. Stat. § 5596 (1875 ed.)), and the scope of that term was thereby left to judicial decision. See *Donnelly v. United States*, 228 U.S. 243, 268-269 (1913). In 1948, however, Congress enacted the current definition of Indian country in 18 U.S.C. 1151, which includes all lands within the boundaries of an Indian reservation, all dependent Indian communities, and trust or restricted allotments. See *Solem*, 465 U.S. at 468.

In recent times, Congress and the Executive Branch have assumed that the INA requires congressional approval of sales of all tribally owned lands, whether or not those lands are within a reservation. See, e.g., Pub. L. No. 101-630, §§ 101(3) and (5), 104 Stat. 4531 (congressional finding that INA required approval of sale of tribally owned fee lands "located approximately one hundred twenty-five miles from the [tribal] land base").

H.R. Rep. No. 1648, 86th Cong., 2d Sess. 1-2 (1960) (citations omitted).

In recent years, Congress has continued to recognize that the INA restricts the alienability of tribally owned lands, including recently acquired lands held in fee. In 1987, Congress authorized the Rumsey Indian Rancheria, a federally recognized Tribe, to sell a parcel of land that it had obtained in fee the previous year. Pub. L. No. 101-630, § 102, 104 Stat. 4531. That statute contains an express congressional finding that "section 2116 of the Revised Statutes (25 U.S.C. 177) prohibits the conveyance of any lands owned by Indian tribes without the consent of Congress." Section 101(5), 104 Stat. 4531. And, in 1992, Congress authorized the Mississippi Band of Choctaw Indians to sell certain lands that it had acquired in fee a year earlier. Pub. L. No. 102-497, § 4, 106 Stat. 3255. Congress enacted that statute because "the Bureau of Indian Affairs advised the tribe that it cannot dispose of the property without Congressional approval." S. Rep. No. 428, 102d Cong., 2d Sess. 5 (1992).

Congress has not consented to the alienation of any tribally owned lands on the Leech Lake Reservation, and the Band acknowledges that the INA precludes any disposition of those lands without Congress's consent. See Br. in Opp. 8-9; Pet. App. 15 n.8. Accordingly, even if the Court were to accept petitioners' (mistaken) argument that "alienability equals taxability" of Indian lands, the tribally owned reservation lands at issue here still would not be taxable, because they are not freely alienable by the Band as a result of the INA.¹⁴

¹⁴ Contrary to the view of the dissent below (Pet. App. 45-46), the Nelson Act did not permanently exempt the lands at issue (or any of the Band's lands) from the INA's restrictions on alienation. The Nelson Act addressed only the initial sale of the Band's lands that occurred a century ago. It did not address the alienability of those lands if reacquired by the Band at some later date. Nor did it purport to repeal

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

SETH P. WAXMAN

Solicitor General

LOIS J. SCHIFFER

Assistant Attorney General

EDWIN S. KNEEDLER

Deputy Solicitor General

BARBARA MCDOWELL

*Assistant to the Solicitor
General*

JAMES C. KILBOURNE

JUDITH RABINOWITZ

SYLVIA F. LIU

Attorneys

JANUARY 1998

the provision of the 1855 Treaty that made the INA applicable to the Leech Lake Reservation. Treaty with the Chippewas, February 22, 1855, Art. VII, 10 Stat. 1169; see *Yakima*, 502 U.S. at 262 (noting the "cardinal rule . . . that repeals by implication are not favored"). Moreover, the Nelson Act authorized the Band to sell its unallotted lands only to the United States, and not to other parties. Since the INA does not apply to acquisitions of Indian lands by the United States, see *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 123-124 (1960), it would be particularly unwarranted to view the Nelson Act as implicating the INA here.

DEC 15 1997

CLERK

In The
Supreme Court of the United States

October Term, 1997

CASS COUNTY, MINNESOTA; SHARON K.
ANDERSON, in her official capacity as Cass
County Auditor; MARGE L. DANIELS, in her
official capacity as Cass County Treasurer;
STEVE KUHA, in his official capacity as Cass
County Assessor; JAMES DEMGEN, in his official
capacity as Cass County Commissioner;
GLEN WITHAM, in his official capacity as
Cass County Commissioner; ERWIN OSTLUND, in his
official capacity as Cass County Commissioner;
VIRGIL FOSTER, in his official capacity
as Cass County Commission,

Petitioners,

vs.

LEECH LAKE BAND OF CHIPPEWA INDIANS,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF FOR THE CITIZENS EQUAL RIGHTS
ALLIANCE (CERA) AS AMICUS CURIAE IN
SUPPORT OF PETITIONERS

DOUGLAS Y. FREEMAN

Counsel of Record

LANA E. MARCUSSEN

BRIAN A. THOMAS

631 North Center

P.O. Box 429

Hardin, Montana 59034

(406) 665-1412

Counsel for Amicus Curiae

27 pp

QUESTION PRESENTED

UNDER YAKIMA COUNTY *v.* YAKIMA INDIAN NATION,
IS LAND ORIGINALLY PATENTED BY THE UNITED
STATES GOVERNMENT, AND SUBSEQUENTLY REAC-
QUIRED IN FEE SIMPLE BY INDIAN BAND, SUBJECT
TO STATE AND LOCAL GOVERNMENT TAXATION IF
IT REMAINS FREELY ALIENABLE IRRESPECTIVE OF
STATUTE OR TREATY UNDER WHICH IT WAS ORIGI-
NALLY CONVEYED?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
TABLE OF AUTHORITIES.....	iii
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT.....	1
STATEMENT OF CASE.....	2
ARGUMENT	3
I. INTRODUCTION.....	3
II. THE 21 PARCELS OF LAND AT ISSUE ARE PRIVATE LANDS	4
A. Congress has Plenary Authority to Dispose of Tribal Lands	4
B. The Nelson Act was an Extinguishment act	7
III. CONGRESS DOES NOT HAVE THE CONSTITUTIONAL AUTHORITY TO DELEGATE THE POWER TO THE EXECUTIVE BRANCH TO CREATE A PERMANENT INDIAN RESERVATION UNDER THE PROPERTY CLAUSE	12
IV. DID CONGRESS INTEND TO SEGREGATE THE LEECH LAKE BAND FROM THE IN REM AUTHORITY OF CASS COUNTY, MINNESOTA, BY RECOGNIZING THE BAND AS AN INDIAN TRIBE UNDER THE INDIAN REORGANIZATION ACT?.....	14
V. CONCLUSION	19

TABLE OF AUTHORITIES

	Page
CASES	
<i>A.L.A. Schechter Poultry Corp. v. United States</i> , 295 U.S. 495 (1935)	13
<i>Alaska v. United States</i> , 117 S.Ct. 1888 (1997).....	6
<i>Adarand Constructors, Inc. v. Federico Pena</i> , 115 S.Ct. 2097 (1995).....	17
<i>Cincinnati Soap Co. v. United States</i> , 301 U.S. 308 (1937)	14
<i>City of Boerne v. Flores</i> , 117 S.Ct. 2517 (1997)	17
<i>County of Yakima v. Confederated Tribes and Bands of Yakima Indians</i> , 502 U.S. 251 (1992).....	3, 10
<i>DeCoteau v. District County Court</i> , 420 U.S. 425 (1975)	7, 8
<i>Downes v. Bidwell</i> , 182 U.S. 244 (1901).....	5
<i>Duro v. Reina</i> , 495 U.S. 676 (1990).....	17
<i>Elk v. Wilkins</i> , 112 U.S. 94 (1884).....	5, 6, 12, 13
<i>Fletcher v. Peck</i> , 10 U.S. (6 Cr.) 87 (1810)	5
<i>Goudy v. Meath</i> , 203 U.S. 146 (1906)	11
<i>Hagen v. Utah</i> , 114 S.Ct. 958 (1994).....	8
<i>Idaho v. Coeur d'Alene Tribe of Idaho</i> , 117 S.Ct. 2028 (1997)	14
<i>Johnson v. McIntosh</i> , 21 U.S. (8 Wheat.) 543 (1823)	4, 5, 11
<i>Leech Lake Band of Chippewa Indians v. Herbst</i> , 334 F.Supp. 1001 (D.Minn. 1971)	8, 9, 10
<i>Lone Wolf v. Hitchcock</i> , 187 U.S. 553 (1903).....	5

TABLE OF AUTHORITIES – Continued

Page

<i>Mille Lacs Band of Chippewas v. Minnesota</i> , 861 F.Supp. 784 (1994)	9
<i>Mille Lacs Band of Chippewas v. Minnesota</i> , 853 F.Supp. 1118 (1994)	9
<i>Montana v. U.S.</i> , 450 U.S. 544 (1982)	2
<i>New Mexico v. Watkins</i> , 969 F.2d 1122 (D.C.Ct.App. 1992)	6
<i>New York v. United States</i> , 505 U.S. 144 (1992)	2, 16, 17
<i>Plessy v. Ferguson</i> , 163 U.S. 537 (1896)	17, 18
<i>Pollard's Lessee v. Hagan</i> , 44 U.S. (3 How.) 212 (1845)	6, 18
<i>Printz v. United States</i> , 117 S.Ct. 2365 (1997)	16
<i>Romer v. Evans</i> , 116 S.Ct. 1620 (1996)	17
<i>Santa Clara Pueblo v. Martinez</i> , 436 U.S. 49 (1978)	5
<i>Scott v. Sandford</i> , 60 U.S. 393 (1857)	4, 5, 15, 18
<i>Seminole Tribe of Florida v. Florida, et al.</i> , 115 S.Ct. 1114 (1996)	14, 17
<i>Seminole Tribe of Florida v. Florida, et al.</i> , 116 S.Ct. 1114 (1996)	14
<i>Seymour v. Superintendent</i> , 368 U.S. 351 (1962)	8
<i>South Dakota v. Dole</i> , 483 U.S. 203 (1987)	17
<i>South Dakota v. U.S. Department of Interior</i> , 69 F.3d 878 (8th Cir. 1995) (cert. denied May 1996)	12, 13
<i>Steward Machine Co. v. Davis</i> , 301 U.S. 548 (1937)	14

TABLE OF AUTHORITIES – Continued

Page

<i>U.S. v. Gratiot</i> , 39 U.S. (14 Pet.) 525 (1840)	6
<i>U.S. v. Midwest Oil</i> , 236 U.S. 459 (1915)	6
<i>United States v. Kagama</i> , 118 U.S. 375 (1886)	13
<i>United States v. Sandoval</i> , 231 U.S. 28 (1913)	12
<i>United States v. Winans</i> , 198 U.S. 371 (1905)	12
<i>Winters v. United States</i> , 207 U.S. 564 (1908)	12
<i>Worcester v. Georgia</i> , 31 U.S. (6 Pet.) 515 (1832)	5
STATUTES	
18 U.S.C. § 1151 (1994)	8
25 U.S.C. § 465 (1994)	2, 8, 10, 12
The Federal Land Policy Management Act of 1976 (FLPMA), 43 U.S.C. § 1701 et seq. (1994)	6
The Indian Bill of Rights, 25 U.S.C. §§ 1301-1303	5, 6
The Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 et seq.	5
The Indian Reorganization Act of 1934, 25 U.S.C. § 461 et seq.	5, 10, 11, 14
The Naturalization Act of 1924, 8 U.S.C. § 1401	14

TABLE OF AUTHORITIES - Continued

Page

OTHER SOURCES

General Welfare or Spending Clause, Art. I, Sec. 8, Cl. 1	14
Nelson Act of 1889, 25 Stat. 642	11, 19
The Property Clause, U.S. Const., Art. IV, Sec. 3	2, 4, 5, 6, 11
The Enclave Clause, U.S. Const., Art I, Sec. 8, Cl. 17.....	6
U.S. Const. Tenth Amendment	2, 18
U.S. Const. Eleventh Amendment	14
U.S. Const. Fourteenth Amendment	2, 12, 16, 17, 18

INTEREST OF AMICUS CURIAE¹

The Citizens Equal Rights Alliance (CERA), is a non-profit association of non-Indians and Indians incorporated and licensed under the laws of the State of New Mexico and headquartered in Santa Fe, New Mexico. CERA's interest in this lawsuit arises from CERA's advocacy of the principle that all people should be treated equally, whether Indian or non-Indian. In this, CERA's interest mirrors that of the Petitioners. The Band's position that the lands purchased by the tribe are exempt from property taxes based upon a racial classification violates this principle.

SUMMARY OF ARGUMENT

This brief questions whether the Congress intended to segregate the Leech Lake Band from the full operation of the laws of Minnesota when it extinguished all but two Chippewa reservations in Minnesota. Judge Diana Murphy of the Eighth Circuit interprets Indian treaties to vest lands to Indian tribes even though the lands were only temporarily reserved from the land disposal acts. Congress has expressly disposed of the lands within these "boundaries," but because some nebulous gathering right was not absolutely, expressly extinguished, inherent

¹ The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

tribal sovereignty remains. Within this question arise fundamental constitutional issues under the Property Clause Art. IV, Sec. 3, the Tenth Amendment and the Fourteenth Amendment Equal Protection Clause. The basic argument relies on *New York v. United States*, 112 S.Ct. 2414 (1992) and *Montana v. U.S.*, 450 U.S. 544, 564 (1982), and then applies more recent decisions of the United States Supreme Court. Specifically, "... exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Montana*, 450 U.S. at 564.

STATEMENT OF CASE

The Leech Lake Band of Chippewa purchased fee land which had formerly been within their traditional use area. Congress expressly extinguished the traditional use area of the Leech Lake Band during the allotment era of federal Indian policy of the Dawes or General Allotment Act period. Pursuant to the Indian Reorganization Act, the United States recognized the Leech Lake Band of Chippewa. There is no Leech Lake reservation under the public domain. The Indian-owned lands comprise approximately 5% of the total area within the original reservation. The Band now claims, through the assistance of the United States, that the lands purchased in fee title are exempt from property taxes levied by Cass County, Minnesota. These reacquired lands are not subject to reservation or withdrawal or exist in trust status under 25 U.S.C. § 465.

The United States disposed of the land through application of the Dawes and Nelson Acts. These lands remain alienable, without any restrictions on alienation. Judge Murphy confuses Congressional disposal with individual sale of unencumbered land; she ignores the distinction between Congress alienating the lands from the Band, and tribal members legitimately transferring property that bears no onus of the federal trust status. The Eighth Circuit Court of Appeals relied on the type of disposal to incorrectly divine whether the purchased lands are subject to taxation. Sections 4 through 6 of the Nelson Act are timber sale and homestead provisions while Section 3 provided for direct allotment disposal. The Court of Appeals' surprisingly narrow interpretation of *Yakima County* created the distinction.

ARGUMENT

I.

INTRODUCTION

Judge Murphy's opinion in *Leech Lake Band of Chippewa Indians v. Cass County, Minnesota* exemplifies what is wrong with Indian law today. The federal government, acting through the tribal party, asked the court to give what is not hers to give, by taking from the State of Minnesota what is not hers to take. The District Court properly found that *County of Yakima v. Confederated Tribes and Bands of Yakima Indians* disposed of the Chippewa claim to immunity from taxation. *County of Yakima v. Confederated Tribes and Bands of Yakima Indians*, 502 U.S. 251 (1992).

Under *Yakima* and the Nelson Act, the review is simple and the conclusion simpler: the federal government disposed of the lands. No amount of judicial activism can restore to the federal government and deny to the state jurisdiction that properly belongs in the state. Even more egregious, Judge Murphy's claim of a trust obligation's existence revives the divisive illogic of *Scott v. Sandford* coupled with the ill-considered paternalism of *Johnson v. McIntosh*. *Scott v. Sandford*, 60 U.S. 393 (1857); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823). The answer to her challenge is clear: each and every individual within the boundaries of the disposed land within the boundaries of Leech Lake Reservation is possessed of rights derived from the Constitution of the United States – rights unadulterated by the Property Clause. In the case at bar, in 1889, Congress chose to protect those rights by allotting and selling the land. In doing so, Congress irretrievably committed the property to state jurisdiction.

II.

THE 21 PARCELS OF LAND AT ISSUE ARE PRIVATE LANDS.

A. Congress has Plenary Authority to Dispose of Tribal Lands.

Before discussing the role of "timber lands" and homestead lands granted under the General Allotment Act and its progeny, the Court must first define the power of Congress over the Leech Lake Band and its land. The Leech Lake Reservation consists of all private land. Lands withdrawn and reserved from the public

domain by definition remain "undisposed" and as "territory" under the Property Clause of the United States Constitution. U.S. Const., Art. IV, Sec. 3. Lands classified as "Indian country" are treated as territory as well. The Congress exercises plenary authority over territorial lands. See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 567-68 (1903).

Traditionally, this authority suffers no limitation from either the Constitution or the Bill of Rights. *Downes v. Bidwell*, 182 U.S. 244 (1901); *Scott v. Sandford*, 60 U.S. 393 (1857). The asserted power of Congress over Indians relies on the Property Clause and the plenary interpretation given by Chief Justice Taney. U.S. Const., Art. IV, Sec. 3; *Scott*, 60 U.S. 393. In short, individuals existing on the territory of the United States are without rights save those the federal government sees fit to give.

Perhaps most sinister was the Chief Justice's reliance on Indian cases to justify slavery. *Scott*, 60 U.S. at 403 (citing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823); *Fletcher v. Peck*, 10 U.S. (6 Cr.) 87 (1810)). Only two decades after the Civil War came to an end, the Supreme Court resurrected its cause in a challenge to the Fourteenth Amendment. Cf. *Scott*, 60 U.S. at 403; *Elk v. Wilkins*, 112 U.S. 94 (1884).

In *Elk v. Wilkins*, the Court permitted a state to deny an Indian state citizenship. This extraordinary conclusion forms the premise of all modern Indian law. See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); Indian Reorganization Act of 1934, 25 U.S.C. 461 et seq.; Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303. Premised

on *Elk's* logic, all persons physically on the reservation have only the rights allowed by Congress under the Indian Bill of Rights. 25 U.S.C. §§ 1301-1303.

Congressional power over territorial lands was meant to be temporary. As the Constitution provides, "Congress shall dispose of the Territories . . ." U.S. Const., Art. IV, Sec. 3. The principle mandating disposal has long been upheld by this Court. See *U.S. v. Midwest Oil*, 236 U.S. 459 (1915); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845); *U.S. v. Gratiot*, 39 U.S. (14 Pet.) 525 (1840). In other areas, Congress itself recognized the temporary nature of its regulatory authority. See Federal Land Policy Management Act of 1976 (FLPMA), 43 U.S.C. § 1701 et seq. Additionally, this Court recently required specific Congressional action to create permanent reservations in a state. *Alaska v. United States*, 117 S.Ct. 1888 (1997); see also *New Mexico v. Watkins*, 969 F.2d 1122 (D.C.Ct.App. 1992) (affirming in part, and on Property Clause grounds, 783 F.Supp. 633 (D.D.C.1992)).

Reserved lands cannot be federal enclaves under the Enclave Clause of the Constitution. U.S. Const., Art I, Sec. 8, Cl. 17. However, Congress could use the Property Clause to dispose of the lands as federal enclaves in accordance with the Enclave Clause' express provisions. Such a disposal would be proper because the Enclave Clause safeguards the States' sovereign jurisdiction within the federalist system. Had Congress acted properly to create tribal enclaves, both federal and state sovereignty would be protected and this Court would need go no further. Unfortunately, Congress has not done so.

B. The Nelson Act was an Extinguishment act.

In *DeCoteau v. District County Court*, this Court faced a not-dissimilar question of whether the state court possessed jurisdiction over specific lands in South Dakota. *DeCoteau v. District County Court*, 420 U.S. 425 (1975). The Sioux Tribe requested and obtained allotment of reservation land under the Dawes Act, and further agreed to terminate the reservation status. *Id.* Many years later, the Secretary of the Interior sought to reestablish tribal boundaries and to restore tribal jurisdiction. *Id.* Both Congress and the Executive declared the lands to be allotted and restored to the public domain. *Id.* Pursuant to the agreement reached between the Sioux Tribe and a commission, the tribal members received allotments of land and a fixed-sum disbursement from the federal treasury. *Id.* Years later, at the request of the Tribe, the Secretary of the Interior sought to singlehandedly restore the reservation to its prior boundaries. *Id.*

The *DeCoteau* Court determined that the State of South Dakota possessed jurisdiction because the reservation had been extinguished and could not be "restored" by the Secretary. In doing so, the Court established the process used to determine whether the use and occupancy rights of the Tribe were terminated. *DeCoteau*, 420 U.S. at 442-447. For the first time the court distinguished between extinguishment acts and surplus lands acts. A conclusion of termination indicates permanent extinguishment of all tribal interest in the land. To terminate there must be:

1. An initial act of Congress allowing modification of the land status;

2. A negotiated agreement to terminate;
3. A Congressional termination act of all right, title and interest of the Tribe;
4. Executive action confirming termination; and
5. Payment of just compensation specific to the lands designated for termination.

DeCoteau, 420 U.S. 425.

For the lands in question, the compliance with the Nelson Act met this exacting standard, as well as those expressed in more recent restatements from the Court. Nelson Act of 1889, ch. 24, 25 Stat. 642 (1889). Most importantly, the Secretary of the Interior possesses no continuing jurisdiction to modify the Chippewa Reservation. Since he cannot rely on FLPMA as authority within Minnesota to reserve federal lands or modify reservations, the Secretary must rely on the Indian Reorganization Act. 25 U.S.C. § 465. This provision provides very limited authority – none of which has been exercised in the case at bar.

The Eighth Circuit discussion of the Nelson Act is based upon an error which fails to acknowledge the impact of *Hagen v. Utah*, on the *Seymour v. Superintendent* interpretation of the criminal statute defining “Indian country.” 18 U.S.C. § 1151 (1994). Compare *Hagen v. Utah*, 114 S.Ct. 958 (1994); *Seymour v. Superintendent*, 368 U.S. 351 (1962). Following *Hagen*, the *Leech Lake Band v. Herbst* court inappropriately relies on *Seymour*. *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F.Supp. 1001, 1005 (D.Minn. 1971). In doing so, it undermines those opinions which most directly relied on *Herbst*’s understanding.

See, e.g., *Leech Lake Band v. Cass County*, 108 F.3d 821 (opinion by Judge Murphy); *Mille Lacs Band of Chippewas v. Minnesota*, 861 F.Supp. 784 (1994) (same); *Mille Lacs Band of Chippewas v. Minnesota*, 853 F.Supp. 1118 (1994) (same). By relying on “Indian country” as an exemplar of tribal sovereignty, the Leech Lake Court ignored the principle that “Indian country” has no relevance to an express extinguishment act of Congress and can provide no limitation thereto. See *Hagen v. Utah*, 114 S.Ct. at 967. In no way can the Nelson Act be construed as anything but a disposal act. The Nelson Act disposed of all lands which had been reserved for the Leech Lake Band, under allotments, timber sales or homesteads. 25 Stat. 642. The Eighth Circuit Court of Appeals’ extrapolation of this error to prevent the lawful operation of a proper disestablishment act only makes the error more needful of correction. Judge Murphy’s expansive view of treaty cases which are no longer proper precedent have lead her to prevent extinguishment of treaty rights, where the disestablishment act required relinquishment of all right, title, and interest to the reservation. The Eighth Circuit has not reviewed the first impression ruling of *Leech Lake Band v. Herbst* after the case law on extinguishment developed in higher courts. The fundamental shift in higher precedent leaves the Eighth Circuit on uncertain ground and in need of redirection.

The Nelson Act functions as a complete disposal of the land either allotted (§ 3), sold as pine timber (§ 4 and § 5) or homestead lands (§ 6). The denomination as “pine lands” or as “homestead lands” is a distinction without meaning – the tribe retained no interest in those lands aside from the right to receive profit from their sale. 25

Stat. 642 §§ 5-6; but see *Leech Lake Band of Chippewa Indians v. Cass County, Minnesota*, 108 F.3d 820 (1997); *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F.Supp. 1001 (D.Minn. 1971). It is uncontroverted that the Nelson Act creates an appropriate disposal of land by the use of Congress' Property Clause power, and once disposal occurs, tribal jurisdiction is permanently at an end. *DeCoteau*, 420 U.S. at 447-49.

The reacquisition of land that was once within tribal boundaries leaves unchanged the nature of the land: it is Indian land held in fee simple. Whether disposed through timber sales, homesteads or individual Indian allotments it is reacquired Indian land held in fee simple. Since the lands are in fee simple, and they have not been placed in trust status, and are not subject to withdrawal order, the land is freely alienable. Indian Reorganization Act of 1934, 25 U.S.C. § 465. Alienable lands are ad valorem taxable. *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992).

The Court of Appeals' decision in this case is most troubling because it impliedly grants an unlimited power to the Secretary of the Interior. The Secretary possesses authority to modify existing withdrawals and often does so. This power works to permit the alteration of land status currently held by the federal government. However, in the case at bar, the land is not owned by the federal government, it possesses neither sovereign title nor fee and the tribe seeks to invoke the limited secretarial authority to protect its relinquished lands with tribal jurisdiction. If such sleight of hand were permissible, every piece of land in the United States would be subject to the Secretary of Interior restoring the use and

occupancy rights of an Indian Tribe. *Johnson v. McIntosh*, 21 U.S. (8 Wheat) 543 (1823). Such an interpretation contravenes both canons of construction and Art. IV, Sec. 3 of the Constitution.

The Eighth Circuit Court of Appeals ironically derives a claim to trust status from the land sold for timber uses. *Leech Lake*, 108 F.3d at 829. Rather than rely more heavily on allotted land in which the federal government retained a temporary trust interest, it emphasizes the timber land, in which the tribe possessed only a derivative interest in that profits from the sale were paid into a trust account. Cf. Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 et seq.; Nelson Act of 1889, 25 Stat. 642. Thus, from a direct financial interest in money, the court divined an interest in jurisdiction. *Leech Lake Band of Indians*, 108 F.3d at 829. Allotted, timber, and homestead lands differ only in the duration of the federal exercise of its racially-based, classification-derived trust obligation. The lands in question here all passed from trust patent title to full private title, and in doing so, divested the Secretary of the Interior of all authority to encumber alienability on those lands. As the District Court for the District Court of Minnesota properly found, alienable land is always taxable land. See generally, *Yakima*, 502 U.S. at 263; *Goudy v. Meath*, 203 U.S. 146 (1906).

III.

CONGRESS DOES NOT HAVE THE CONSTITUTIONAL AUTHORITY TO DELEGATE THE POWER TO THE EXECUTIVE BRANCH TO CREATE A PERMANENT INDIAN RESERVATION UNDER THE PROPERTY CLAUSE.

Congress, like individuals, cannot give what it does not have. Similarly, it cannot delegate a power it does not possess. The Supreme Court faced this issue last term in issuing its Memorandum Opinion in *South Dakota v. U.S. Department of Interior*. *South Dakota v. U.S. Department of Interior*, 69 F.3d 878 (8th Cir. 1995) (opinion withdrawn). The appeal challenged the constitutionality of 25 U.S.C. § 465 as an unconstitutional delegation of legislative power to the Secretary of Interior.

Section 465 was a broad delegation of the power to create Indian reservations. These constitute permanent reservations of public domain use for a specific class of people because they do not undergo FLPMA review. *United States v. Sandoval*, 231 U.S. 28 (1913); *Winters v. United States*, 207 U.S. 564 (1908); *United States v. Winans*, 198 U.S. 371 (1905). The delegation of power and lack of Congressional power leaves Congress completely unaccountable for the Indian reservation lands.

The authority to make such a classification of federal resources traces its origin to *Elk v. Wilkins*. *Elk v. Wilkins*, 112 U.S. 94 (1884). The *Wilkins* Court held that the Fourteenth Amendment did not apply to Indians, thereby reinvigorating Scott almost 20 years after its purported demise. *Wilkins'* progeny form the premise of 25 U.S.C. § 465 and reinforced Congress' reluctance to question Executive Branch regulation of the Indian tribes - even

though *Wilkins'* line relies on Congress' exclusive Property Clause authority.

The *South Dakota* attempt to end this unconstitutional delegation relies on *A.L.A. Schechter Poultry Corp. v. United States*. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). Through *Schechter Poultry* and New York, the non-delegation doctrine expands to become the "political accountability" test. The test provides for the rights of citizens to hold their public officials directly accountable through stronger separation of power between all branches of government. In doing so, it affirms the fundamental necessary division between the roles the state and federal government must play in our federalist system.

There is no question that the Leech Lake Band operates largely immune to the views of the State of Minnesota. In no way can it be contended to be a subdivision of the state or to derive its authority from the state. *United States v. Kagama*, 118 U.S. 375 (1886). The nontribal residents of alienated land within the Leech Lake Reservation, were Judge Murphy's understanding to survive this Court, possess no means to obtain governmental accountability from their state or the territorial governors. Above all else, the Leech Lake Band of Indians is not accountable.

IV.

DID CONGRESS INTEND TO SEGREGATE THE LEECH LAKE BAND FROM THE IN REM AUTHORITY OF CASS COUNTY, MINNESOTA, BY RECOGNIZING THE BAND AS AN INDIAN TRIBE UNDER THE INDIAN REORGANIZATION ACT?

Even after the Naturalization Act of 1924, 8 U.S.C. § 1401, made Indians full citizens, the Congress of the United States passed the Indian Reorganization Act (IRA), June 18, 1934, ch. 576, § 1, 48 Stat. 984, 25 U.S.C. § 461, et seq., which places the "Indian trust" obligations under the General Welfare or Spending Clause, Art. I, Sec. 8, Cl. 1. The New Deal administration was very aware of this combination of constitutional authority being asserted. *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937); *Cincinnati Soap Co. v. United States*, 301 U.S. 308 (1937). It was no accident that the IRA was proposed as the means to "civilize the tribes."

In the lower court opinion, Judge Murphy places tribal inherent sovereignty rights ahead of the sovereign right of Cass County, Minnesota. This directly contradicts this Court's recent rulings in *Idaho v. Coeur d'Alene Tribe of Idaho*, 117 S.Ct. 2028 (1997); *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996). These Eleventh Amendment cases demonstrate that tribal governments and tribal members are state citizens and subject to the Eleventh Amendment bar of state sovereign immunity. *Coeur d'Alene* confronted a federal lands question (which sovereign holds title to the bed of the river) and held that the in rem jurisdiction to decide what in effect was a quiet title action was vested in the Idaho courts. The Coeur d'Alene Tribe challenged the public trust responsibility of

Idaho and was told to present their claim to the courts of Idaho. Putative Indian tribal sovereignty has blossomed into a fundamental challenge to the public trust doctrine and the balance struck in *Montana v. United States*. *Montana v. United States*, 450 U.S. 544 (1981). It is time to inspect the foundation of this challenge.

Chief Justice Taney, in the fourth section of *Scott*, relied on "territorial land status" to justify a permanent trusteeship over all of the people in a territory. He did this by allowing the formation of civil authority as necessary

" . . . to organize and preserve civilized society, and prepare it to become a state; and what is the best form must always depend on the condition of the territory at the time and the choice of the mode must depend on the exercise of a discretionary power by Congress, acting within the scope of its constitutional authority . . . "

Scott, 60 U.S. 449-52. *Scott v. Sandford* intentionally restructured federalism by redefining "sovereign people" to fit the federal government's general trust responsibility over the People. *Id.* To this day, Black's law dictionary defines "sovereign people" by reference to *Scott*.

The IRA combines this Scott-based power into a "general welfare" format, and in doing so, completely displaces the federalism balance of the constitutional structure by extending the territorial trust status against People residing in the states. This is a power that cannot last. It represents virtually unlimited authority over People because through it, the federal government can compel states to enforce federal laws against the People. Limited instances of this power appear in *New York v. U.S.*

– a challenge to federal mandates – and no doubt will continue to appear until the power is checked.

Federal mandates that compel a state official to enforce a federal program are unconstitutional. *Printz v. United States*, 117 S.Ct. 2365 (1997); *New York v. United States*, 505 U.S. 144 (1992). The power asserted at Leech Lake by the United States is of the same source, but is the reversed image of the federal mandate found to be flawed. A mandate is a direct order. The asserted power of the federal government at Leech Lake is an indirect displacement of the normal operation of state law in assessing a county property tax on alienable lands required by an Indian Tribe.

Federally-derived tribal status cannot prevent a state official from enforcing the everyday operation of a state law enforcing in rem jurisdiction, unless Congress directly preempts it. In truth, the usurpation of the state-based public trust has existed longer and in more areas of law than direct mandates to the states; direct mandates are the unwanted stepchildren of the virulent conflux of the Property Clause and the Tax and Spend Clause. See generally *Printz v. United States*, 117 S.Ct. 2365 (discussing appearance of mandates in the 1970's). To allow the subtle and insidious side of this power to be constitutional while ruling the direct and more accountable power unconstitutional defies the analysis of *New York v. United States*. *New York*, 505 U.S. 144.

The solution to the indirect power is the same as to the direct power. Congress must act directly to impose a Property Clause or Section 5 of the Fourteenth Amendment restriction on a state. Lacking a direct delegation of

authority from Congress, the Executive Branch has no authority to displace operation of state law by commandeering the public trust. Congress' power under the Spending Clause to create incentives for the states by offering federal funds for the adherence to federal programs is now well discussed. *Printz*, 117 S.Ct. 2365; *New York*, 505 U.S. 144; *South Dakota v. Dole*, 483 U.S. 203 (1987). The indirect power avoids incentives, and relies on threatened litigation or actual litigation against the state for enforcement. With this in mind, it is unsurprising that the United States has served as Amicus in this matter from early in the litigation.

Even if Congress created special status in the Indian tribes through the IRA, the Supreme Court retains the power to review the act for constitutionality. The power to define discrimination under the equal protection clause of the Fourteenth Amendment resides in the courts under Art. III of the Constitution. *City of Boerne v. Flores*, 117 S.Ct. 2517 (1997). *Adarand Constructors* states that the Fourteenth Amendment Equal Protection Clause applies to the Federal government under the same standard as applies to the States. *Adarand Constructors, Inc. v. Federico Pena*, 115 S.Ct. 2097 (1995). Congress cannot use its Article I authority, specifically the Indian Commerce Clause, to interfere with Article III judicial review. *Seminole*, 115 S.Ct. 1114 (1996).

The Supreme Court can confront the IRA as an unconstitutional segregation of rights using an Equal Protection standard. See, e.g., *Romer v. Evans*, 116 S.Ct. 1620 (1996); *Duro v. Reina*, 495 U.S. 676 (1990). *Romer* expressly overruled *Plessy v. Ferguson* and its "separate but equal" standard in its entirety. Cf. *Romer v. Evans*, 116 S.Ct. 1620;

Plessy, 163 U.S. 537 (1896). Ruling federal segregation of Indians unconstitutional would end the federal authority to deny Indians the right to own land, and in doing so, would allow Indian sovereignty to remain, protecting the very real cultural values of each Indian tribe.

The IRA is federally-enforced segregation which preserves an unconstitutional combination of territorial war and general welfare powers – against the rights of all the People. The expropriation of the public trust by the federal government prevents the transfer of municipal sovereignty to states. The ongoing abuse of territorial status serves to denude the state of the responsibility to manage itself for its people; leaving the people without a separate sovereign to hold accountable. While this reality may not violate the Equal Footing Doctrine of *Pollard's Lessee*, it is difficult to believe that it does not violate the Equal Protection Clause of the Fourteenth Amendment of the Constitution. By enacting differing Enabling Acts for each state, the federal government asserts a power to reserve additional rights or displace in rem state authority for new uses or newly acquired lands, causing discrimination and creating separate classes of citizens. In doing so, it violates the principles of federalism repeated in the Tenth Amendment of the Constitution. The Tenth Amendment expressly reserved all unallocated powers to the states in an attempt to prevent the result made into law by *Scott v. Sandford*.

In 1981, in the face of a federal assertion that as Trustee for the Crow Indian Tribe, the government and the Tribe had sole authority to regulate hunting and fishing within the Crow Tribe Reservation, the Court ruled that the title to the bed of the Big Horn River

passed to Montana upon its admission into the Union. *Montana v. United States*, 450 U.S. 544 (1981). It is significant to note, in the context of the instant case, that the Court in Montana states that

"as a general principle, the Federal Government holds lands under navigable rivers in trust for future states, to be granted to such states when they enter the Union. There is a strong presumption against conveyance of such lands by the United States; . . . the United States will not be held to have conveyed such land except because of 'some international duty or public exigency' . . . "

Montana, 450 at 552. The Court in *Montana* found that since the 1851 and 1868 treaties between the United States and the Crow Tribe did not expressly refer to the river bed, its language was not strong enough to overcome the presumption against the sovereign's conveyance of the same. The presumption of the public trust and general welfare must favor the majority over a distinct segregated minority if the Constitution is going to survive. If there is a question of Congressional intent to allow taxation of Indian owned lands it is in favor of the states. *Yakima*. *Montana* found the balance in 1980, it is simply a matter of enforcing the balance.

V.

CONCLUSION

This Court should reverse the Eighth Circuit ruling as to Sections 4 and 5 of the Nelson Act and confirm Cass County's authority to tax the fee lands of the Leech Lake Band of Chippewa. It is time to declare the Indian people

full and equal citizens subject to all the benefits and responsibilities of full land ownership. The Indian land owners in Leech Lake have held onto their allotments for over 100 years. Ad valorem property taxes being assessed are a small price to pay for obtaining full constitutional rights.

Respectfully submitted,

DOUGLAS Y. FREEMAN

LANA E. MARCUSSEN

BRIAN A. THOMAS

9

Supreme Court, U.S.

F I L E D

DEC 12 1997

No. 97-174

In the Supreme Court of the United States
October Term, 1997

CLERK

CASS COUNTY, MINNESOTA, et al,

Petitioners,

v.

LEECH LAKE BAND OF CHIPPEWA INDIANS,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Eighth Circuit

BRIEF OF AMICI CURIAE STATES OF
MICHIGAN, ALABAMA, CALIFORNIA, COLORADO,
IDAHO, IOWA, MONTANA, NEW YORK,
OKLAHOMA, and UTAH
IN SUPPORT OF PETITIONERS

FRANK J. KELLEY
Attorney General, State of Michigan

Thomas L. Casey
Solicitor General, State of Michigan
Counsel of Record

R. John Wernet, Jr.
Assistant Attorney General, State of Michigan
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Attorneys for Amici Curiae

(Additional counsel listed on inside cover.)

22 pp

BILL PRYOR
Attorney General of
Alabama
11 So. Union Street
Montgomery, AL 36130

DANIEL E. LUNGREN
Attorney General
State of California
1300 I. Street
Sacramento, CA 95814

GALE A. NORTON
Attorney General
State of Colorado
1525 Sherman Street, 5th Fl.
Denver, CO 80203

THOMAS J. MILLER
Iowa Attorney General
2nd Floor Hoover Bldg.
Des Moines, IA 50319

ALAN G. LANCE
Idaho Attorney General
P.O. Box 83720
Boise, ID 83720

JOSEPH P. MAZUREK
Attorney General of
Montana
P.O. Box 201401
215 N. Sanders
Helena, MT 59620

DENNIS C. VACCO
Attorney General
State of New York
The Capitol
Albany, NY 12224

W. A. DREW
EDMONDSON
Attorney General of
Oklahoma
2300 N. Lincoln Blvd.
Suite 112
Oklahoma City, OK 73105

JAN GRAHAM
Utah Attorney General
236 State Capitol
Salt Lake City, UT 84114

QUESTION PRESENTED

Amici Curiae States would state the issue as follows:

Consistent with the decisions of this Court in *Goudy v. Meath*, 203 U.S. 146 (1906) and *Yakima County v. Yakima Indian Nation*, 502 U.S. 251 (1992), may a state or local government impose *ad valorem* property taxes upon reservation land owned in unrestricted fee simple by an Indian tribe or by an individual tribal member where the land was originally patented and removed from federal trust or from the public domain pursuant to a treaty or statute other than the General Allotment Act?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES.....	iii
INTEREST OF THE AMICI CURIAE.....	1
SUMMARY OF ARGUMENT.....	3
ARGUMENT:	
I. THE DECISIONS OF THIS COURT IN <i>GOUDY</i> AND <i>YAKIMA</i> EXPLICITLY HELD THAT, WHEN CONGRESS AUTHORIZES THE PATENTING OF AND REMOVAL OF TRUST RESTRICTIONS UPON RESERVATION LANDS, THAT AUTHORIZATION CONSTITUTES CONGRESSIONAL CONSENT TO THE IMPOSITION OF AD VALOREM PROPERTY TAXES UPON SUCH UNRESTRICTED FEE PATENTED LAND.....	5
II. THE RESULT REACHED BY THIS COURT IN <i>GOUDY</i> AND <i>YAKIMA</i> IS CONSISTENT WITH THE LONGSTANDING TREATMENT OF THIS ISSUE BY ALL THREE BRANCHES OF THE FEDERAL GOVERNMENT AND WITH THE HISTORY AND PURPOSE OF THE ALLOTMENT POLICY ITSELF.....	8
CONCLUSION.....	16

TABLE OF AUTHORITIES

Cases	Pages
<i>Board of County Comm'rs v. United States</i> , 308 U.S. 343 (1939).....	10-11
<i>County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation</i> , 502 U.S. 251 (1992).....	passim
<i>Goudy v. Meath</i> , 203 U.S. 146 (1906).....	4, 6, 7
<i>Leech Lake Band of Chippewa Indians v. Cass County, Minnesota</i> , 108 F.3d 820 (8th Cir. 1997).....	1, 4, 7
<i>Lummi Indian Tribe v. Whatcom County, Washington</i> , 5 F.3d 1355 (9th Cir. 1993).....	1, 3
<i>Montana v. United States</i> , 450 U.S. 544 (1981).....	13
<i>Northern Cheyenne Tribe v. Hollowbreast</i> , 425 U.S. 649 (1976).....	13
<i>Pennock v. Board of County Comm'rs of Franklin County</i> , 103 U.S. 44 (1881).....	7
<i>Southern Ute Indian Tribe v. Board of County Commissioners of La Plata</i> , 855 F. Supp. 1194 (D. Colo. 1994).....	1
<i>Thompson v. County of Franklin</i> , Civil No 92-CV-1258 (NPM-DNH) (N.D.N.Y.).....	1
<i>United States v. Michigan</i> , 106 F.3d 130 (6th Cir. 1997).....	1, 4
<i>United States v. Mitchell</i> , 445 U.S. 535, 544 (1980).....	11
<i>United States v. Rickert</i> , 188 U.S. 432 (1903).....	9-10

Statutes

25 U.S.C. § 331 <i>et seq.</i>	3
25 U.S.C. § 349.....	7
25 U.S.C. § 352a.....	10
25 U.S.C. § 409a.....	12
25 U.S.C. § 412a.....	12
25 U.S.C. § 465.....	12
25 U.S.C. § 501.....	12
24 Stat. 388, 389 (February 8, 1887).....	3
25 Stat. 642 (January 14, 1889).....	1
34 Stat. 182 (May 8, 1906).....	4, 6
44 Stat. 1247 (February 26, 1927).....	10
46 Stat. 1205 (February 21, 1931).....	10

Other Authorities

19 Op. Att'y Gen. 161 (July 27, 1888.).....	8, 12-13
50 L.D. 691 (1924).....	9
53 L.D. 133 (1930).....	9
Cohen, F., <i>Handbook of Federal Indian Law</i> (1942).....	9
Prucha, F.P., <i>Indian Policy in the United States</i> (1981).....	14
U. S. Dep't. of Interior, <i>Federal Indian Law</i> (1958).....	9

INTEREST OF THE AMICI CURIAE

This case presents the question of whether the States and their political subdivisions may continue to impose *ad valorem* taxes on fee patented lands located within Indian reservations whenever those lands are acquired or held in unrestricted fee simple by the resident Indian tribe or its members.

While the specific controversy before the Court in this case concerns lands in the State of Minnesota which were initially disposed of under the terms of the Nelson Act, 25 Stat. 642 (January 14, 1889), the underlying principles governing the resolution of this dispute will directly affect every state containing Indian reservation lands. Indeed, this issue has already resulted in litigation in at least six states, and has met, at best, with varying and inconsistent decisions. See, e.g., *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992); *Lummi Indian Tribe v. Whatcom County*, 5 F.3d 1355 (9th Cir. 1993), *cert. denied*, 512 U.S. 1228 (1994); *United States v. Michigan*, 106 F.3d 130 (6th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3093 (U.S. June 30, 1997) (No. 97-14); *Southern Ute Indian Tribe v. Board of County Commissioners of La Plata*, 855 F. Supp. 1194 (D. Colo. 1994), *vacated & remanded with instructions to dismiss on mootness grounds*, No. 94-1310 (10th Cir. July 20, 1995); see also *Thompson v. County of Franklin*, Civil No. 92-CV-1258 NPM-DNH (N.D.N.Y.) (pending and undecided).

Each of the States represented in this brief will be directly affected by the decision of the Court in this case. Specifically, each of these States contains fee patented lands which have been acquired and are held in unrestricted fee simple by Indian tribes or individual tribal members and which would be subject to a claim of exemption under the analysis adopted by the Eighth Circuit in this case.

This controversy is by no means academic. If the view adopted by the Eighth Circuit were to be upheld, the States, and their local political subdivisions, would suffer very real and substantial consequences.

First and foremost would be the reduction in the tax base in reservation areas. In most of the States, property taxes are imposed at the local government level and are used to support the public schools and other essential local services, all of which are generally available without restriction to area residents including tribal members. In many of these areas, particularly those where the property tax base is already limited as the result of substantial amounts of land owned or held in trust by the federal government, the exemption of these additional lands would severely strain the ability of the affected local governments to provide these services. Moreover, the severity of this problem is likely to increase. Many reservation areas are currently experiencing a marked increase in the reacquisition of lands by tribes and their members. This is particularly true in and around those reservation areas that are experiencing significant tribal economic development due to Indian gaming activities. If these lands were removed from the tax rolls upon acquisition by a tribe or a tribal member, the impact upon local government and local services would be devastating.

Aside from the direct loss of tax revenues, the Eighth Circuit's narrow reading of *Yakima* would also significantly increase both the complexity and the expense of property tax administration in reservation areas. In many cases, it would become necessary to conduct extensive parcel by parcel title searches to determine whether a given parcel originally passed out of trust under the General Allotment Act, rendering it taxable under *Yakima*, or whether it originally passed out of trust under the terms of some other statute or treaty provision, in which case the tax status may be open to question and to litigation. The difficulty of this problem is well illustrated by the decision of the Eighth Circuit in the *Leech Lake* case itself: those parcels allotted to tribal members under the Nelson Act were deemed taxable – but only if the original patents were issued after the adoption of the Burke Amendment in 1906 – while other parcels, sold as pine lands or homestead lands under different provisions of the very same act, were deemed exempt. The problem is further complicated by the fact that many tribes do not routinely make their membership rolls

available, making it difficult for the assessors to determine which property owners are in fact enrolled tribal members.

SUMMARY OF ARGUMENT

In *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992), this Court held that, when Congress enacted section 5 of the General Allotment Act of 1887, 24 Stat. 388 (February 8, 1887) (now codified, as amended, at 25 U.S.C. § 331 *et seq.*), authorizing the alienation of Indian lands allotted under that act, Congress also consented to the imposition of state *ad valorem* taxes upon such lands, even where those lands are owned by a tribe or its members. At the conclusion of the Court's opinion, it explicitly left open the question of whether a different result might obtain as to lands patented in fee and sold pursuant to some other legal authority separate from the General Allotment Act:

The Yakima Nation contends it is not clear whether the parcels at issue in this case were patented under the General Allotment Act, rather than under some other statutes in force prior to the Indian Reorganization Act. E.g., 25 U.S.C. §§ 320, 379, 404, 405. *We leave for resolution on remand that factual point, and the prior legal question whether it makes any difference.*

502 U.S. at 270 (emphasis added).

Shortly thereafter, the Ninth Circuit addressed that unresolved question in *Lummi Indian Tribe v. Whatcom County*, 5 F.3d 1355 (9th Cir. 1993), *cert. denied*, 512 U.S. 1228 (1994), finding that the underlying rationale adopted by this Court in *Yakima* was not limited to the General Allotment Act but also extended to similar lands which had been allotted, patented, and removed from trust under the terms of a treaty.

Two Circuits have now issued decisions directly conflicting with *Lummi* – and, we believe, directly conflicting with this Court's decision in *Yakima*. The Eighth Circuit in the instant case, *Leech Lake Band of Chippewa Indians v. Cass County, Minnesota*, 108 F.3d 820 (8th Cir. 1997), and the Sixth Circuit in *United States v. Michigan*, 106 F.3d 130 (6th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3093 (U.S. June 30, 1997), have each adopted a narrowly limited reading of *Yakima*. Both courts have held that this Court's decision in *Yakima* applies only to lands allotted and removed from trust under the General Allotment Act and, even then, only by virtue of the express tax exemption language added to that Act by the Burke Amendment, 34 Stat. 182 (May 8, 1906). Indeed, the Eighth Circuit has gone so far as to conclude, in effect, that the decision in *Yakima* applies only to lands actually patented *after* the effective date of the Burke Amendment in 1906. 108 F.3d at 829.

We believe that the decision of the Eighth Circuit, and that of its sister circuit in *United States v. Michigan*, misreads this Court's analysis in *Yakima*. In upholding the right of the State in that case to impose its *ad valorem* property tax upon the unrestricted fee patented lands in *Yakima*, this Court specifically found that when Congress authorized the alienation of such lands in section 5 of the General Allotment Act, it rendered them subject to such taxation. In so holding, the Court expressly reaffirmed its earlier decision in *Goudy v. Meath*, 203 U.S. 146 (1906), which had reached a similar conclusion contemporaneously with the adoption of the General Allotment Act. This conclusion clearly did not depend upon the subsequent language added to the General Allotment Act by the Burke Amendment. It is true that the Court went on to state that the explicit language later added by the Burke Amendment made the intent of Congress "more clear," 502 U.S. at 264; it is also true that the Court utilized the Burke Amendment as a guide in interpreting the scope of that Congressional intent. Nothing in this discussion, however, even remotely suggests that the original language of § 5 was not itself sufficiently clear so as to authorize the taxation of such land.

This conclusion is consistent with the history and purpose of the federal allotment policy and with the explicit

treatment of this issue by all three branches of the federal government from the time of the original adoption of that policy through into modern times. The very purpose of the General Allotment Act, and of the other statutes and treaty provisions containing similar provisions, was to convert Indian people into citizens and landowners, with all of the corresponding rights and duties including payment of property taxes. Congress recognized that this transition would have to be gradual, and thus provided for trust status or restraints upon alienation for varying periods of time. In this context, the very provisions authorizing the temporary restrictions are clear evidence that Congress understood and intended that, upon the lifting of such restrictions, these patented lands would become subject to property taxes.

ARGUMENT

I.

THE DECISIONS OF THIS COURT IN GOUDY AND YAKIMA EXPLICITLY HELD THAT, WHEN CONGRESS AUTHORIZES THE PATENTING OF AND REMOVAL OF TRUST RESTRICTIONS UPON RESERVATION LANDS, THAT AUTHORIZATION CONSTITUTES CONGRESSIONAL CONSENT TO THE IMPOSITION OF A D VALOREM PROPERTY TAXES UPON SUCH UNRESTRICTED FEE PATENTED LAND.

In *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992), this Court was confronted with the question of whether the County of Yakima, Washington, could impose its *ad valorem* property tax upon lands allotted under the General Allotment Act which had been patented and removed from trust status and had come to be owned in unrestricted fee simple by the Yakima tribe or by its members. The Court expressly recognized and reaffirmed the rule that courts will decline to find that Congress has authorized state taxation of Indians

within a reservation unless it has "'made its intention to do so unmistakably clear.'" 502 U.S. at 258, citing *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985). However, the Court concluded that Congress had in fact provided such authorization in section 5 of the General Allotment Act. That Act provided for the allotment of Indian reservation lands throughout the United States and, in section 5, further provided that:

[U]pon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall . . . declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made . . . and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever

24 Stat. 388, 389 (February 8, 1887) (emphasis added). Relying upon this statutory provision, and upon its own earlier decision in *Goudy v. Meath*, 203 U.S. 146 (1906), the *Yakima* Court concluded that:

when § 5 [of the General Allotment Act] rendered the allotted lands alienable and encumberable, it also rendered them subject to assessment and forced sale for taxes.

Yakima, 502 U.S. at 263-264.

Having stated this explicit conclusion, the Court went on to observe that Congress later "made this implication of § 5 more explicit, and its nature more clear," in 1906 when it passed the Burke Act, 34 Stat. 182 (May 8, 1906). That act amended § 5 of the General Allotment Act by adding more explicit language specifying that, following the issuance of an unrestricted fee patent, "all restrictions as to sale,

incumbrance, or taxation of said land shall be removed." (Emphasis added.) See, 25 U.S.C. § 349, as amended. This amendatory language, the Court stated, "reaffirmed" the conclusion that section 5 of the General Allotment Act was intended to permit the imposition of state property taxes upon such unrestricted fee lands. *Yakima*, 502 U.S. at 264.

In the instant case, the Eighth Circuit seized upon this discussion of the Burke Act in *Yakima*, characterizing it as the essential linchpin of the Court's decision. According to the Eighth Circuit, the decision in *Yakima* "repeatedly pointed to the Burke Act proviso in § 6 as the primary source of clear congressional intent to allow the *ad valorem* tax levied by Yakima County." 108 F.3d at 825. In other words, in the view of the Eighth Circuit, had it not been for the new language added by the Burke Act, the Court in *Yakima* would not have found property taxes to be authorized under § 5 of the General Allotment Act. This reading of *Yakima* is simply wrong; it essentially disregards the explicit finding in *Yakima* that "when § 5 rendered the allotted lands alienable and encumberable, it also rendered them subject to assessment and forced sale for taxes," 502 U.S. at 263-264, and it also disregards the Court's explicit reliance upon and reaffirmation of its earlier decision in *Goudy v. Meath*, *supra*.

The lands at issue in *Goudy* had been patented pursuant to treaty provisions rather than under the provisions of the General Allotment Act and had initially been protected by restrictions against alienation. *Goudy*, 203 U.S. at 146-147. Citing the provisions of the General Allotment Act, *Goudy* held that, upon the lifting of the restrictions upon alienation and the issuance of a fee patent, the lands became subject to property taxes. The Court further concluded that the treaty language which authorized the eventual lifting of restrictions upon alienation for allotted lands was clearly intended to encompass "involuntary as well as voluntary alienation." *Id.* at 149-150. *Goudy*, accordingly, stands unequivocally for the proposition that, after federal restrictions upon alienation are removed, unrestricted fee patented Indian lands become subject to state taxation. See also, *Pennock v. Board of County Comm'rs*, 103 U.S. 44, 48 (1881).

II.

THE RESULT REACHED BY THIS COURT IN *GOUDY* AND *YAKIMA* IS CONSISTENT WITH THE LONGSTANDING TREATMENT OF THIS ISSUE BY ALL THREE BRANCHES OF THE FEDERAL GOVERNMENT AND WITH THE HISTORY AND PURPOSE OF THE ALLOTMENT POLICY ITSELF.

The result reached by this Court in *Goudy* and reaffirmed in *Yakima* is clearly correct and is consistent with the general understanding and treatment of this issue dating back to the time of the enactment of the General Allotment Act. From that time through to the present, it has been generally understood and accepted that, in the absence of federal trust restrictions, fee patented reservation lands are subject to *ad valorem* taxes. This understanding is reflected in the decisions and opinions of both the executive and judicial branches as well as in the laws enacted by Congress itself.

The executive branch made its understanding known as early as 1888, shortly after the enactment of the General Allotment Act, when the Attorney General of the United States issued an opinion to the Secretary of the Interior concerning the tax status of lands patented to individual Indians under the provisions of four separate acts including the General Allotment Act. 19 Op. Att'y Gen. 161 (July 27, 1888.) Each of the statutes in question imposed trust restrictions upon the patented land for a specific term of years ranging, depending upon the particular act, from five to twenty-five years. The Attorney General concluded that in each instance, by virtue of the trust restrictions, the lands so patented were exempt from taxation for the period during which the trust restrictions remained in place. See, e.g., *id.* at 169. This conclusion reflected the clear understanding of the Attorney General that, upon the expiration of the trust period and the removal of restrictions upon alienation, the lands patented under each of these acts would become subject to taxation by the States.

This understanding is even more directly stated in subsequent opinions issued by the Department of the Interior. For example, a 1924 opinion issued by the Department concluded that "[w]hen an allottee voluntarily applies for a removal of restrictions [by requesting issuance of an unrestricted fee patent] prior to the expiration of the period of exemption originally provided for, the granting of such application subjects those lands to taxation even in the hands of the original allottee." 50 L.D. 691, 694 (1924); accord, 53 L.D. 133, 136 (1930); see generally Felix S. Cohen, *Handbook of Federal Indian Law*, 259 (1942) ("[s]hould [an allottee] . . . apply for the issuance of a fee patent and be accorded one pursuant to law, there seems no reason to believe that his lands would not thereby become subject to state taxation"); U. S. Dep't. of Interior, *Federal Indian Law*, 859 (1958) (same).

A similar understanding is reflected in the opinions of this Court during the period following the enactment of the General Allotment Act. The clearest and most direct example of this is, of course, the decision in *Goudy*, *supra*, which explicitly addressed the issue and concluded that patented lands do become taxable upon the withdrawal of the trust restrictions. However, while no other case decided by this Court directly addressed this question until *Yakima*, numerous decisions rather clearly demonstrate the Court's understanding in this regard.

For example, in *United States v. Rickert*, 188 U.S. 432 (1903), the Court held that trust lands allotted under the General Allotment Act were exempt from taxation by the State and that this exemption extended to permanent improvements made upon those lands. Addressing first the issue of the trust land itself, the Court concluded that:

[U]ntil a regular patent conveying the fee was issued to the several allottees, it would follow that there was no power in the State of South Dakota, for state or municipal purposes, to assess and tax the lands in question until at least the fee was conveyed to the Indians. . . .

Id., at 437 (emphasis added). Similarly, with respect to the permanent improvements, the Court concluded:

While the title to the land remained in the United States, the permanent improvements could no more be sold for local taxes than could the land to which they belonged.

Id., at 442 (emphasis added).

Issued over 35 years later and subsequent to passage of the Indian Reorganization Act, this Court's decision in *Board of County Comm'rs v. United States*, 308 U.S. 343 (1939), reflected the same understanding. That case involved a claim for repayment with interest of property taxes collected by the County from a tribal member for lands originally patented in trust under the General Allotment Act. In 1918, over the objection of the owner, the Secretary of the Interior canceled the trust patent and instead issued a fee simple patent. As a result, the County thereafter began to subject the land to regular property taxes. In 1927, Congress enacted legislation authorizing the Secretary of the Interior not only to reinstate the trust status of such parcels, but to actually *cancel* the fee simple patents which had been issued over the objection of the allottees. Significantly, the 1927 Act went on to explicitly provide that, "upon cancellation of such patent in fee simple the land shall have the same status as though such fee patent had never been issued." See, 44 Stat. 1247 (February 26, 1927), as amended by 46 Stat. 1205 (February 21, 1931), 25 U.S.C. § 352a (emphasis added). In 1935, the United States finally canceled the patent in question. The following year, the United States successfully brought suit in U.S. District Court to recover both the taxes which the County had collected and interest on that money. On appeal to the Supreme Court, the County did not contest its liability to repay the taxes, instead challenging only the Government's right to recover interest thereon. On this question, the Court ruled for the County, holding that no interest was due. In so holding, the Court demonstrated rather clearly its understanding that, until the unrestricted fee patent was canceled, the County had every reason to believe that the land was properly subject to taxation:

Jackson County in all innocence acted in reliance on a fee patent given under the hand of the President of the United States. Even after Congress in 1927 authorized the Secretary of the Interior to cancel such a patent, it was not until 1935 that such cancellation was made. Here is a long, unexcused delay in the assertion of a right for which Jackson County should not be penalized. By virtue of the most authoritative semblance of legitimacy under national law, the land of M-Ko-Quah-Wah and the lands of other Indians had become part of the economy of Jackson County. For eight years after Congress had directed attention to the problem, those specially entrusted with the intricacies of Indian law did not call Jackson County's action into question. Whatever may be her unfortunate duty to restore the taxes which she had every practical justification for collecting at the time, no claim of fairness calls upon her also to pay interest for the use of the money which she could not have known was not properly hers.

Id., at 352 (emphasis added).

This understanding was reiterated by this Court as recently as 1980 in *United States v. Mitchell*, 445 U.S. 535, 544 (1980), where the Court observed that "[i]t is plain . . . that when Congress enacted the General Allotment Act, it intended that the United States 'hold the land . . . in trust' . . . because it wished to prevent alienation of the land and to ensure that allottees would be immune from the state taxation."

The understanding that fee patented Indian lands are subject to state imposed *ad valorem* taxes in the absence of federally imposed trust restrictions is likewise evident in numerous statutes enacted by Congress which authorize or impose explicit restrictions upon the taxation of certain lands acquired by the Secretary of the Interior for Indian tribes or individual Indians - restrictions that would be

entirely redundant if such lands were not otherwise subject to taxation. For example, 25 U.S.C. § 501, as amended, authorizes the Secretary of the Interior to acquire agricultural lands on behalf of a tribe, band, group, or individual Indian and further provides that:

[L]ands so acquired shall be taken in the name of the United States, in trust for the tribe, band, group, or individual Indian for whose benefit such land is so acquired, and while the title thereto is held by the United States said lands shall be free from any and all taxes. . . . [Emphasis added.]

Similar provisions apply to homestead lands purchased out of the trust or restricted funds of individual Indians, 25 U.S.C. § 412a, lands purchased with the money received from the sale of restricted trust lands, 25 U.S.C. § 409a, and lands purchased by the Secretary for the purpose of providing land for Indians under 25 U.S.C. § 465. These provisions, enacted in the 1930's and continuing in effect today, indicate the clear understanding of Congress that the tax exempt status of fee patented Indian land depends upon its being placed in trust or restricted status and that, in the absence of such explicit restrictions, such lands are subject to state imposed *ad valorem* property taxes.

This general understanding that unrestricted fee patented lands would be subject to state property taxes reflects the fundamental underlying purpose and intent of the various statutes and treaty provisions providing for allotment during the last half of the 19th century. This is evident in the Attorney General's July 27, 1888, opinion, *supra*. There, commenting upon all four of the allotment acts under consideration in the opinion (and not merely upon the General Allotment Act), the Attorney General stated:

The interesting feature of this legislation is that it marks a new epoch in the history of the Indians, namely, that in which Congress has begun to deal with them as individuals, and not only as nations, tribes, or bands, as heretofore. *It is dismemberment of the tribes and*

bands, and absorption, as citizens, of the individuals composing them by the States and Territories containing the lands on which such individuals settle or may be settled, that is the policy of this new legislation.

But Congress has not deemed it safe, in making the Indian a freeholder, to give him at once the same control over the land as other freeholders enjoy. The legislation above mentioned deprives the Indian settler of the right of conveying or encumbering the land, in any way, for a period stated, or provides that it shall be held by the United States for a given time in trust for the sole use and benefit of the Indian, and, at the expiration of such time, be conveyed to him by patent.

. . . It is only after a considerable period of probation that, he can be educated to understand the dignity and responsibilities that belong to citizenship and the ownership of property and it is to protect him, while receiving this education, that Congress has placed the above-mentioned restraints upon his property rights. . . .

Id., at 164-165 (emphasis added); see also, *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 650 n. 1 (1976) ("[t]he objects of [the allotment] policy were to end tribal land ownership and to substitute private ownership, on the view that private ownership by individual Indians would better advance their assimilation as self-supporting members of our society and relieve the Federal Government of the need to continue supervision of Indian affairs") and *Montana v. United States*, 450 U.S. 544, 559 n. 9 (1981) ("[t]he policy of the [various allotment acts] was the eventual assimilation of the Indian population and the 'gradual extinction of Indian reservations and Indian titles'" and "throughout the congressional debates, allotment of Indian Land was consistently equated with the dissolution of tribal affairs and jurisdiction"). (Citation omitted.) It is also important to recognize that the severalty provisions undergirding the

General Allotment Act did not constitute a radical shift in Congressional policy but instead represented the fruition of federal practice begun much earlier in the nineteenth century. See generally Francis Paul Prucha, *Indian Policy in the United States* 237 (1981) ("Allotments of land in severalty had been advocated from the days of Thomas Jefferson, and piecemeal legislation had authorized allotments for a number of tribes. Now such a process was too slow and uncertain for the new reformers. The panacea they sought was a general allotment law that would turn all Indians into individual land owners and break up traditional tribal relations.")

Thus, Congress' very purpose in allotting and patenting lands to individual Indians was to transform those allottees into citizens and property owners, with all of the rights and duties thereof, including the payment of property taxes. The imposition by the Congress of temporary restraints upon alienation, in this context, not only represented an attempt to protect the allottees during this intended period of transition, but also constituted an explicit recognition that, in the absence of such restrictions, the lands would be fully alienable and taxable.

It is true, as this Court reiterated in *Yakima*, that its cases "reveal a consistent practice of declining to find that Congress has authorized state taxation unless it has 'made its intention to do so unmistakably clear.'" *Yakima*, 502 U.S. at 258. This practice, however, has never functioned as a mandate to disregard the historical context in which that Congressional intent is manifested. As the foregoing authorities demonstrate, at the time the various allotment provisions were adopted, whether by statute or by treaty, and continuing through to modern times, all three branches of the federal government, including the Congress, have understood that the removal of trust restrictions and the issuance of an unrestricted fee patented rendered such fee lands subject to *ad valorem* property taxes. This understanding reflects the fundamental purpose and intent of the various allotment provisions themselves. Given this historical context and common understanding, it is reasonable to conclude, as this Court did in *Yakima*, that, when Congress authorizes the patenting of reservation lands,

and further provides for explicitly temporary restrictions upon the alienation and taxation of those lands, it has made "unmistakably clear" its understanding and intent that those lands will be subject to taxation upon the expiration or removal of those restraints.

Finally, this conclusion with respect to *allotted* lands logically must be extended to *all* reservation lands owned in fee by a tribe or its members. No principled reason exists to justify treating neighboring parcels of land differently for taxation purposes based on the precise method by which they originally left the public domain and passed into fee ownership. Congress plainly did not contemplate such a result, and it should not be wrought by a judge-made rule whose purpose is to give expression to, not frustrate, Congressional intent. It thus makes no sense to contend that lands that were sold by the Federal Government to non-Indians, such as the pine and the homesteaded lands here, should become *non-taxable* when subsequently acquired by the respondent or its members but that neighboring lands similarly acquired by the tribe *are* taxable merely because they were originally allotted to a tribal member. Congress anticipated that land ownership and the right to alienate those ownership rights were to be accompanied by the tax obligations borne generally by other landowners. The decision below and respondent's position before this Court, in short, invoke the right rule but ignore its animating objective of carrying out Congress' otherwise manifest will.

CONCLUSION

For these reasons, Amici States respectfully ask this Court to reverse the determination of the Eighth Circuit in this case and to hold that unrestricted fee patented lands owned by Indian tribes or by tribal members continue to be subject to *ad valorem* property taxes imposed by state and local governments.

Respectfully submitted,

Attorneys for Amicus Curiae States:

FRANK J. KELLEY
Attorney General

Thomas L. Casey
Solicitor General
Counsel of Record

R. John Wernet, Jr.
Assistant Attorney General
P.O. Box 30212
Lansing, MI 48909
(517) 373-1124

December 12, 1997

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CASS COUNTY, MINNESOTA, *et al.*,
v. *Petitioners,*

LEECH LAKE BAND OF CHIPPEWA INDIANS,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF OF THE
NATIONAL ASSOCIATION OF COUNTIES,
NATIONAL GOVERNORS' ASSOCIATION
NATIONAL LEAGUE OF CITIES,
NATIONAL CONFERENCE OF STATE LEGISLATURES,
U.S. CONFERENCE OF MAYORS, INTERNATIONAL
CITY/COUNTY MANAGEMENT ASSOCIATION,
INTERNATIONAL MUNICIPAL LAWYERS
ASSOCIATION, AND COUNCIL OF
STATE GOVERNMENTS AS *AMICI CURIAE*
IN SUPPORT OF PETITIONERS

CARTER G. PHILLIPS
JACQUELINE GERSON COOPER
EDWARD R. McNICHOLAS
SIDLEY & AUSTIN
1722 Eye St., N.W.
Washington, D.C. 20006
(202) 736-8000

RICHARD RUDA *
Chief Counsel
STATE AND LOCAL LEGAL
CENTER
444 N. Capitol St., N.W.
Washington, D.C. 20001
(202) 434-4850
* Counsel of Record for the
Amici Curiae

QUESTION PRESENTED

Whether a state or local government can assess *ad valorem* taxes on land parcels within an Indian reservation where Congress alienated these parcels from tribal control and placed them into the open market more than one hundred years ago, but the Tribe has recently repurchased the parcels from private parties and holds them in fee.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF THE <i>AMICI CURIAE</i>	1
STATEMENT	3
A. Federal Policy to Allot Lands and Assimilate Indians	3
B. The 1889 Nelson Act for the Chippewa in Min- nesota	5
C. The Indian Reorganization Act of 1934	7
D. Proceedings Below	8
SUMMARY OF ARGUMENT	10
ARGUMENT	12
I. WHERE CONGRESS HAS CHOSEN TO RE- LINQUISH FEDERAL CONTROL AND PROTECTION OF RESERVATION LAND THROUGH ALLOTMENT OR PUBLIC SALE, THE TRIBE'S REPURCHASE OF SUCH PARCELS IN FEE DOES NOT RE-ESTAB- LISH FEDERAL IMMUNITY FROM STATE AND LOCAL <i>AD VALOREM</i> TAXATION.....	12
A. Federal Supremacy is the Sole Source of Any Indian Immunity from State and Local Taxation	12
B. Indian Lands That Were Allotted or Sold Pursuant to the Dawes Act or Other Con- gressional Action are Taxable Because Con- gress Made Them Alienable	13
C. Tribes Should Not Be Permitted to Circum- vent Congress' Statutory Mechanism for Restoring Taxable Lands to Federal Trust Status	21

TABLE OF CONTENTS—Continued

	Page
II. EXEMPTION FROM AD VALOREM TAXES FOR LANDS THAT TRIBES HOLD IN FEE WOULD IMPAIR STATE AND LOCAL GOV- ERNMENT ADMINISTRATIVE AND ECO- NOMIC INTERESTS	23
CONCLUSION	28

TABLE OF AUTHORITIES

Cases	Page
<i>Arkansas v. Farm Credit Servs.</i> , 117 S. Ct. 1776 (1997)	18
<i>Board of County Comm'rs v. United States</i> , 308 U.S. 343 (1939)	18
<i>Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation</i> , 492 U.S. 408 (1980)	13, 20
<i>Bryan v. Itasca County</i> , 426 U.S. 373 (1976)	13, 19
<i>California State Bd. of Equalization v. Cheme- heuvi Indian Tribe</i> , 474 U.S. 9 (1985)	20
<i>Cotton Petroleum Corp. v. New Mexico</i> , 490 U.S. 163 (1989)	10, 12-13, 19
<i>County of Yakima v. Yakima Nation</i> , 502 U.S. 251 (1992)	passim
<i>Department of Taxation & Fin. v. Milhelm Attea & Bros.</i> , 512 U.S. 61 (1994)	20
<i>Duro v. Reina</i> , 495 U.S. 676 (1990), superseded by Act of Oct. 28, 1991, Pub. L. No. 102-137, 1991 U.S.C.C.A.N. (105 Stat.) 646	20-21
<i>Goudy v. Meath</i> , 203 U.S. 146 (1906)	passim
<i>Hagen v. Utah</i> , 510 U.S. 399 (1994)	passim
<i>In re Heff</i> , 197 U.S. 488 (1905), overruled, <i>United States v. Nice</i> , 241 U.S. 591 (1916)	5
<i>Larkin v. Paugh</i> , 276 U.S. 431 (1928)	14
<i>Lone Wolf v. Hitchcock</i> , 187 U.S. 553 (1903)	6
<i>Mattz v. Arnett</i> , 412 U.S. 481 (1973)	7
<i>McClanahan v. Arizona State Tax Comm'n</i> , 411 U.S. 164 (1972)	12, 13
<i>McCulloch v. Maryland</i> , 17 U.S. (4 Wheat.) 316 (1819)	12
<i>Mescalero Apache Tribe v. Jones</i> , 411 U.S. 145 (1973)	13
<i>Montana v. Blackfeet Tribe</i> , 471 U.S. 759 (1985) ..	10, 13, 16
<i>Montana v. United States</i> , 450 U.S. 544 (1981) ..	16, 19, 21
<i>Negonsott v. Samuels</i> , 507 U.S. 99 (1993)	17
<i>Oklahoma Tax Comm'n v. Chickasaw Nation</i> , 515 U.S. 450 (1995)	18
<i>Oklahoma Tax Comm'n v. Citizen Band Potawa- tomi Indian Tribe</i> , 498 U.S. 505 (1991)	20

TABLE OF AUTHORITIES—Continued

	Page
<i>Oklahoma Tax Comm'n v. Sac and Fox Nation</i> , 508 U.S. 114 (1993)	13, 16
<i>Oliphant v. Suquamish Indian Tribe</i> , 435 U.S. 191 (1978)	21
<i>Oneida Indian Nation v. County of Oneida</i> , 414 U.S. 661 (1973)	14
<i>Rice v. Rehner</i> , 463 U.S. 713 (1983)	17
<i>Solem v. Bartlett</i> , 465 U.S. 463 (1984)	6, 17, 19
<i>South Carolina v. Catawba Indian Tribe, Inc.</i> , 476 U.S. 498 (1986)	17
<i>South Dakota v. Bourland</i> , 508 U.S. 679 (1993)	16, 19
<i>Strate v. A-1 Contractors</i> , 117 S. Ct. 1404 (1997) ..	19, 20
<i>United States Dep't of the Interior v. South Dakota</i> , 117 S. Ct. 286 (1996)	22
<i>United States ex rel. Saginaw Chippewa Indian Tribe v. Michigan</i> , 106 F.3d 130 (6th Cir.), petition for cert. filed, 66 U.S.L.W. 3085 (U.S. June 30, 1997) (No. 97-14)	27
<i>Washington v. Confederated Tribes of Colville Reservation</i> , 447 U.S. 134 (1980)	13, 20
<i>White Earth Land Recovery Project v. County of Becker</i> , 544 N.W.2d 778 (Minn. 1996)	24-25
Statutes and Treaties	
18 U.S.C. § 1151	19
25 U.S.C. § 177	10
§ 348	21
§ 357	21
§ 465	passim
§§ 2701-2721	23
Act of May 27, 1902, ch. 888, 25 Stat. 245 (codified at 25 U.S.C. § 379)	5
Act of June 27, 1902, ch. 1157, 32 Stat. 400 (1902)	7
Act of June 25, 1910, ch. 431, 36 Stat. 855 (1910) ..	7
Act of Feb. 14, 1923, ch. 76, 42 Stat. 1246 (1923) (codified at 25 U.S.C. § 335)	4
Act of Aug. 15, 1953 (Public Law 280), ch. 505, 67 Stat. 589 (1953)	19

TABLE OF AUTHORITIES—Continued

	Page
Appropriations Act of March 3, 1891, ch. 543, 26 Stat. 989 (1891)	6
Burke Act of 1906, ch. 2348, 34 Stat. 182 (1906) (codified at 25 U.S.C. § 349)	5
Cheyenne River and Standing Rock Reservations Act, ch. 218, 35 Stat. 460 (1908)	6
Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (1968)	19
Colville Reservation Act, ch. 140, 27 Stat. 62 (1892)	6
Colville Reservation Act, ch. 1126, 34 Stat. 80 (1906)	6
Devil's Lake Reservation Act, ch. 1620, 33 Stat. 819 (1904)	6
Flathead Reservation Act, ch. 1495, 33 Stat. 302 (1904)	6
Flathead Reservation Amend. Act, ch. 156, 36 Stat. 296 (1910)	6
Fort Berthold Reservation Act, ch. 264, 36 Stat. 455 (1910)	6
General Allotment (Dawes) Act, ch. 119, 24 Stat. 388 (1887) (codified at 25 U.S.C. §§ 331-34, 339, 341-42, 348-49, 354, 381)	passim
Great Sioux Act, ch. 405, 25 Stat. 888 (1889)	6
Indian Reorganization (Wheeler-Howard) Act of 1934, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-479)	7, 7-8
Nelson Act of Jan. 14, 1889, ch. 24, 25 Stat. 642 (1889)	passim
Oklahoma Osage Allotment Act, ch. 3572, 34 Stat. 539 (1906)	6
Pine Ridge Reservation Act, ch. 257, 36 Stat. 440 (1910)	6
Rosebud Sioux Act, ch. 1484, 33 Stat. 254 (1904) ..	6
Rosebud Sioux Act, ch. 2536, 34 Stat. 1230 (1907) ..	6
Rosebud Sioux Act, ch. 260, 36 Stat. 448 (1910)	6
Treaty with the Confederated Ottoes and Missour- ias, Mar. 15, 1854, 10 Stat. 1038	4
Wind River Reservation Act, ch. 1452, 33 Stat. 1016 (1905)	6

TABLE OF AUTHORITIES—Continued

Federal Regulations	Page
25 C.F.R. Part 151	21
25 C.F.R. § 151.10	21
§ 151.10(e)	2, 11, 22, 25
State Attorney General Opinions	
1993 Minn. Op. Atty. Gen. 414A-5	25
1996 Idaho Op. Atty. Gen. 24	25
Other Authorities	
Bureau of Census, U.S. Dep't of Commerce, 1990 Census of Population: General Population Char- acteristics: American Indian and Alaska Native Areas (1992)	8, 26
Felix S. Cohen's Handbook of Indian Law (Ber- nard Strickland, ed. 1982)	passim
William W. Folwell, A History of Minnesota (1930)	7
Newspaper Articles & Press Releases	
Lyn Bixby, <i>Mohegan Sunrise</i> , Hartford Courant, Oct. 11, 1997, at A1	23
Sen. Christopher Bond, <i>Gambling in Missouri</i> , Congressional Press Release, May 20, 1997.....	23
James Dao, <i>Gambling in the Middle of Nowhere</i> , N.Y. Times, Nov. 10, 1997, at B1	23
Mike Kaszuba, <i>Tensions Rise Over Tribe's Land in Shakopee</i> , Minneapolis Star Tribune, Nov. 9, 1997, at 1A	26
Jim Myers, <i>Istook Says Land Move Threatens Schools</i> , Tulsa World, May 30, 1997, at A11.....	22
Jeff Nesbit, <i>Indian Tribes Can't Lose Bets on Casinos</i> , Washington Times, June 28, 1996, at B7	26
Sara Olkon, <i>Town Council Backs Tribe's Applica- tion for Trust Status</i> , Providence Journal- Bulletin, Aug. 25, 1997, at 1C	23
Andrew Padilla, <i>Cochiti Resident Fights Tax</i> , Albuquerque Journal, Nov. 6, 1997, at 4	26

TABLE OF AUTHORITIES—Continued

	Page
Jonathan Rabinovitz, <i>Towns Near Pequot Casino Object to Annexation Plan</i> , New York Times, Nov. 25, 1997, at B5	26
Larry Richardson, <i>Oneidas Purchase New Plot: Site at Thruway Exit 34 May Be Used for a Casino and Truck Stop</i> , Syracuse Herald Jour- nal, Mar. 1, 1997	26

INTEREST OF AMICI CURIAE COUNTIES

Amici are counties in five states which provide a wide variety of services to their residents and lands within their boundaries. All these counties include lands which were at one time within the boundaries of Indian reservations and lands that were at one time held in trust by the United States (and therefore not taxed).

Congress later provided that much of this land be conveyed to individual Indians and to others, with most ultimately passing into fee ownership. The core of this policy was the General Allotment Act of 1887, 24 Stat. 388, but other Acts of Congress specific to areas of the Country or to particular tribes and bands further implemented that policy.

One group of these counties (identified above) are within the State of Minnesota, within which the Nelson Act of January 14, 1889, ch. 24, 25 Stat. 642 involved herein was one such implementing Act, and so the re-writing of this part of history by the circuit court is particularly problematic to those counties.

Amici are representative of many other counties similarly situated throughout the United States. As this Court has often noted, fee lands are scattered throughout the counties, some of which are owned by Indians and Indian tribes. The history of each area is, of course, as varied and diverse as federal Indian policy—with one exception. Historically, counties have routinely taxed fee lands as necessary to provide services to the lands and their occupants. This practice has been the accepted rule for decades. The level and cost of services provided by the counties has increased, as has been true for government services more generally. Landowners as taxpayers have often, and understandably resisted increases in property taxation to provide such services.

In many of *Amici* counties, the services requested or required by lands occupied by Indian tribes have increased to a greatly disproportionate degree. This is for two main reasons. First, many lands are trust lands, and are not

subject to property taxes which are an important primary traditional source of funding for counties. Secondly, more and more tribes are engaged in such activities as casino gambling and tourism-related activities which have higher than proportionate impacts through bringing large numbers of non-residents to temporarily visit or stay in the counties. Policing and road costs are examples of areas in which these impacts are greater than those associated with the more usual activities of residents on their lands.

The problem is cumulative: bringing higher costs to counties, with a taxable land base which already includes trust lands which do not fully share the costs. The decision below will further aggravate these problems (while complicating further the administrative process of determining, assessing and collecting).

As will be noted from the list of *Amici* above, ten of the counties herein represented are within the State of Minnesota, and therefore share some of the history of Petitioner, notably the Nelson Act and that Act's careful implementation with the specific consent of the Indians in Minnesota. The history of the counties located in other states is substantially the same with respect to the taxation of fee lands.

The position of the United States in continuing to challenge the legitimacy of this taxation as trustee for Indian tribes is of special concern. In *Yakima County v. Yakima Indian Nation*, 502 U.S. 251 (1992), the United States expressly told this Court:

Thus, if the Court agrees with the position of *either* party in this case, its legal ruling would be *dispositive* of this and other *pending* and *future* cases, and therefore would *obviate the need for potentially protracted and complex litigation* regarding the impact of real estate taxes on a case-by-case basis . . . we urge the Court to grant review now . . . and thereby to resolve a question of recurring importance on Indian reservations.

Br. for the United States as *Amicus Curiae* at 8, *Yakima County v. Yakima Indian Nation*, 502 U.S. 251 (1992) (Nos. 90-408, 90-577) (emphasis added).

By Order of January 7, 1991, this Court had invited the Solicitor General to file a brief expressing the views of the United States in *Yakima*. In response, the United States urged this Court to grant review for the broad policy reasons noted in the above quotation.¹

A substantial number of *amici* counties also participated in the *Yakima* litigation in an attempt to "resolve" this question of "recurring importance." *Id.* See Br. for La Plata County, Colorado, *et al.* as *Amicus Curiae* in Supp. of Pet'rs, *Yakima* (Nos. 90-408, 90-577). After this Court granted the petition, the United States, of course, supported the position of the Indian tribes. On the merits, the views of the United States were squarely rejected.

Contrary to the express representation to this Court, the United States then proceeded, as a party or as *amicus curiae* in other cases across the country, to continue to support additional litigation of this kind. In these cases, the United States maintained that *Yakima* should be *narrowly construed* and *severely restricted* in application. As a result, the concerns that prompted the filing of the *amici curiae* brief by the Counties in the *Yakima* case have only been exacerbated.

The tax records in county court houses are being rifled. Since 1987, tribal governments across the

¹ Earlier, the United States repeatedly told the Ninth Circuit Court of Appeals the same thing:

The issue is important.—The issue is of *great importance* to Indians on reservations *throughout* the United States . . . applies to the *vast majority* of Indian reservations in the United States . . . The *broad importance* of the decision to reservation Indians. . . .

Mem. for the United States as *Amicus Curiae* in Supp. of Pet. for Reh'g and Suggestion for Reh'g *En Banc* at 1, 2, *Yakima*, 960 F.2d 793 (No. 88-3926) (emphasis added).

country, with the assistance and encouragement of the United States, have challenged the validity of county ad valorem taxes on Indian fee lands . . . As a result, members of tribes have refused to pay their taxes . . . tax abatement petitions have been filed . . . individual lawsuits have been filed against counties in State courts . . . tribal lawsuits have been filed against counties in federal courts . . . and even worse, the United States, just a year ago, after the decision below, targeted one *Amici* county and sued the county and the State in federal court in the name of the United States . . . (Federal complaint with attachments; one inch thick, burdensome interrogatories and requests for production of documents). Apart from the fact that county governments can ill afford to squander scarce resources on senseless litigation, the issue here threatens the very core of county fiscal integrity.

Id. at 1.

Taxation is a matter of crucial importance to county governments. As noted above, in recent years the need for services in some counties has skyrocketed because of tribal casino development and other related tribal activities. For example, in one rural *Amici* County *total* taxes collected by the county per year have increased by approximately thirty-three percent (33%) due to casino related expenditures.

To be sure, the extent of Indian fee ownership varies from reservation to reservation and reflects radically different fact situations. Locally, tribal enrollment lists are not ordinarily available to county governments and even these lists do not include non-member Indians, who also own fee property. So we are not certain of the total sum involved. One thing, however, is certain. The amount is substantial—because these counties also contain large areas of other lands that are non-taxable and held in trust by the United States for Indians and Indian tribes. For example, in one county, approximately 60 percent of the entire county is held in trust by the United States for the

tribe or its members or other Indians. Of the taxable land, Indian fee land on paper roughly constitutes more than 15 percent of the seven hundred and fifty thousand (\$750,000) to eight hundred and fifty thousand (\$850,000) dollars of total taxes collected by the county per year in recent years. In another county, the same figure represents roughly 8 percent of the total taxes collected. In other counties the percentage could be more and in some counties it is undoubtedly less. But the exact percentage is beside the point. Whatever the amount, county government in these areas is not some new and novel experience. It has been there for decades pursuant to Congressional Policy. That Congressional Policy has authorized the taxes here—and not simply on a restricted case by case basis, as the court of appeals has indicated. The issue in this case represents a fundamental and most basic concept in federal Indian law that has been resolved and relied on for decades.

The decisions of this Court in *Goudy v. Meath*, 203 U.S. 146 (1906), and *Yakima*, 502 U.S. 251, were not intended to be limited in this manner. The Counties submit this *Amici* brief to make clear that tradition, precedent and the decisions of this Court support the concept that Congress generally equated alienability with taxation. In addition, nothing in the application of these principles in Minnesota supports any other conclusion. The Minnesota documentation affirmatively establishes that Congress clearly intended all Nelson Act lands would be similarly taxable.

SUMMARY OF ARGUMENT

The decision of the panel majority of the Eighth Circuit Court of Appeals has incorrectly restricted the “alienability equals taxability” principles central to the decisions of this Court in *Goudy v. Meath* and *County of Yakima v. Yakima Indian Tribe*. A brief review of nearly a century of federal Indian law precedent from this Court makes that historical understanding clear. In addition, Congress did not intend anything in the Nelson Act or related legis-

lation to alter that traditional principle. As a result, although the Minnesota legislation was tailored to the status of those reservations, the thrust of the documentation clearly confirms congressional understanding of taxability.

ARGUMENT

I. THE OPINION OF THE COURT OF APPEALS IS CONTRARY TO A TRADITION OF TAXATION AND CONFLICTS IN PRINCIPLE WITH THE RELEVANT DECISIONS OF THIS COURT.

At the petition stage in this litigation, the Counties fully supported the reasons for granting the petition set forth in the petition and in the brief of supporting *amici curiae* States. Br. for Lewis County, Idaho, *et al. Amici Curiae*, in Supp. of Pet'rs, Cass County, Minnesota, *et al., Cass County, Minnesota v. Leech Lake Band of Chippewa Indians* (No. 97-174) (August 29, 1997). The Counties recognized that the primary considerations governing review would focus on the conflict among the circuits and the conflict with the decision of this Court in *Yakima*. The Counties further submitted that the decision of the panel conflicted substantially with other related decisions of this Court and a tradition of taxation. The brief in support at that time focused on that tradition and highlighted those decisions.

On the merits, this Counties Brief will first generally address those same important areas. In addition, however, we now also highlight the aspects of the Nelson Act, that confirm that the same congressional understanding was applied to Minnesota. In this regard, we have appended the significant excerpts from H.R. Exec. Doc. No. 247, 51st Cong., 1st Sess. (1889) that unequivocally supports that position. *Amici Co. App.* at 1a-141a.

A. Introduction.

In order to place the taxation of fee lands issue in historical context, one need first refer to the fact that until 1989, nearly everyone, including the United States, acted upon the recognition that such taxes were clearly per-

missible. At the petition stage, the Counties appended the opinion of the Associate Solicitor, Division of Indian Affairs, of the Department of the Interior Memorandum to this effect dated March 22, 1979. *Amici Co. Pet. App.* 1a-3a.

In fact, this is the reason that Respondents cannot cite any other appellate opinions that have reached the tax exempt conclusion. There are none. These decisions (*Leech Lake* and *Michigan*) represent the first time any courts of appeals have ever held that ordinary fee lands owned by Indian tribes or their members are not taxable—not an insignificant point.

Again, the United States is, in large part, responsible for this radical departure from tradition and precedent. For this reason, a few preliminary observations regarding the arguments of the United States submitted below are in order. (Additionally, we fully expect they will be repeated here.)

First, although the United States flaunts its “expertise in Indian law matters” Br. for the United States at 1, *Leech Lake Band of Chippewa Indians v. Cass Co., Minn.*, 108 F.3d 820 (8th Cir. 1997) (No. 95-4263), the United States never acknowledges that:

1. Most of the arguments relied upon by the United States have been just slightly revised from those submitted by the United States in *Yakima* and rejected by this Court.
2. No court of appeals had ever adopted the argument of the United States.
3. A century of agency opinions and congressional action detract from the argument of the United States.
4. A 1902 Congressional Resolution and a 1923 Act of Congress were passed to extend the scope of the General Allotment Act (*See generally Stevens v. C. I. R.*, 452 F.2d 741 (9th Cir. 1971):

Insofar as not otherwise specifically provided, all allotments in severalty to Indians, outside of the Indian Territory, shall be made in conformity to the

provisions of the Act approved February eighth, eighteen hundred and eighty-seven, entitled "An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," and other general Acts amendatory thereof or supplemental thereto, and shall be subject to all the restrictions and carry all the privileges incident to allotments made under said Act and other general Acts amendatory thereof or supplemental thereto.

Joint Resolution of June 19, 1902, 32 Stat. 744:

That unless otherwise specifically provided, the provisions of the Act of February 8, 1887 (Twenty-fourth Statutes at Large, page 388), as amended, be, and they are hereby, extended to all lands *heretofore* purchased or which may *hereafter* be purchased by authority of Congress for the use or benefit of any individual Indian or band or tribe of Indians.

Act of February 14, 1923, 42 Stat. 1246, 25 U.S.C. § 335 (emphasis added).

5. Provisions in the Indian Reorganization Act of 1934, 48 Stat. 984, and related regulations at 25 C.F.R. 151 detract from the arguments of the United States.

6. The original edition of Felix Cohen's Handbook of Federal Indian Law (1942 ed.) at 258-261, undermines the Non-Intercourse Act argument that the United States again submits.

7. The 1982 Handbook of Federal Indian Law supports the United States, but those arguments were submitted by the United States and rejected in *Yakima*.³

In other instances, the argument of the United States was seriously misleading. For example, the following

³ The original Cohen text (and the subsequent revisions) have been viewed by some as tribal advocacy works. See Conference of Western Attorneys General, American Indian Law Deskbook at xiii-xv (1993).

"omission" assertion appears at page 29 in the brief the United States submitted in *Leech Lake*:

Yakima did not, however, address the immunity enjoyed by tribally-owned land. This *omission* likely stems from the Court's primary focus on individual Indian ownership of fee lands in that case.

Br. for the United States at 19, *Leech Lake* (No. 95-4263) (emphasis added).

The United States should know better. The "Question Presented" in the Brief for the United States in *Yakima* was carefully drafted in this respect:

Whether Yakima County may impose its ad valorem tax on real property situated within the boundaries of the Yakima Indian Reservation that is owned in fee by the *Yakima Nation or individual members* of the Yakima Nation.

Br. for the United States as *Amicus Curiae* at I, *Yakima*, 502 U.S. 251 (Nos. 90-408, 90-577) (emphasis added).

Further, tribal ownership was discussed throughout the briefs and noted on four separate occasions in the text of the *Yakima* opinion. *Yakima*, 502 U.S. at 256, 264 & n.4. See also Tr. of Oral Argument at 4, 18 and 28, *Yakima* (Nos. 90-408, 90-577).

Finally, at other times, the United States inadvertently undermined the position of the Leech Lake Band. For example, in this instance, the Leech Lake Band would like this Court to think that the Nelson Act was unusual and atypical in every respect. Br. in Opp'n, *Leech Lake* (No. 95-4263). On the other hand, the United States routinely recognized that:

The Nelson Act, ch. 24, 25 Stat. 642, was one of a series of allotment acts passed by Congress after the passage of the General Allotment Act of 1887, 24 Stat. 388.

Br. for the United States at 2, *Leech Lake* (No. 95-4263). In this case, the United States is undoubtedly correct. For example, see the Great Sioux Act of 1889, 25 Stat.

896, where the General Allotment Act was, like the Nelson Act, simply tailored to the specific situation existing in the State at issue. Until recently, no one claimed that the South Dakota fee lands were not taxable.

In short, the United States recognized early on in the *Yakima* litigation that the General Allotment Act was a statute of general applicability, amended on several occasions to further reflect its universal application, and in some instances, as in Minnesota, specifically incorporated by express reference in the text of related legislation dealing with allotments required by previous legislative formats. Accordingly, *Yakima* was thoroughly briefed on both sides in recognition of this fundamental understanding, with the United States (and 25 different tribes from across the country) submitting dozens of arguments in their briefs to preclude the taxation of fee lands. As *Yakima* attests, this Court, with one dissent, rejected these *ad valorem* tax exemption claims.

Because it is not possible for any Opinion to address each and every argument that is not deemed persuasive, the assumption that this Court in *Yakima* did not address or consider all arguments of substance would be especially unwarranted in this instance. The United States and others filed *exhaustive* briefs detailing every conceivable argument in support of a tribal tax exemption on fee lands (including the *Goudy*, 203 U.S. 146, has been overruled argument, the *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976) argument, the 1934 Indian Reorganization Act argument, the 18 U.S.C. § 1151 Indian Country argument, and the 25 U.S.C. § 177 argument)⁸—all of which were rejected. In *Ya-*

⁸ Immunity of Indian lands from state taxation and control is at the very core of federal Indian policy. See *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985); 25 U.S.C. § 177.

Br. for the United States as *Amicus Curiae* at 12, *Yakima*. But see *Larkin v. Paugh*, 276 U.S. 431, 433-434 (1928) and *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498 (1986).

kima, as in other recent cases, the position of the United States was simply tailored to support the arguments of Indian tribes. And this is the perspective from which the opinions of the courts of appeals that have adopted those arguments in these cases should be viewed.

B. The General Allotment Act And All Other Legislation Have Been Consistently Construed To Generally Authorize The Taxation Of Fee Patent Land.

As we noted in *Yakima*, although this Court generally discussed the General Allotment Act in *Draper v. United States*, 140 U.S. 240 (1891), it was not until 1903 that a tax related issue reached this Court in *United States v. Rickert*, 188 U.S. 432 (1903).⁴ There, the United States correctly headed its argument with the proposition that “the lands of the Indian allottees are not taxable under the authority of the State *during* the trust period” and concluded that improvements were similarly “exempt from taxation *during* the trust period that the land is so exempt, such improvements being in legal contemplation land.” Br. for the United States at 15, 42, *Rickert* (No. 216) (emphasis added). The *Rickert* opinion reflects this representation:

[N]o power in the State of South Dakota, for State or municipal purposes, to assess and tax the lands in question *until* at least the fee was conveyed to the Indians While the title to the land remained in the United States, the permanent improvements, could no more be sold for local taxes than could the land to which they belonged.

Rickert, 188 U.S. at 437, 442 (emphasis added).

⁴ Early in the previous decade, prior to the adoption of the General Allotment Act, this Court rejected a related claim for exemption in *Pennock v. Board of County Comm'rs of Franklin County*, 103 U.S. 44 (1881):

When the patent of the government is once issued for the lands, all restrictions upon their alienation, not expressly named, are gone.

Id. at 48.

A few years later, in *Goudy*, 203 U.S. 146, a related issue was generally discussed and decisively resolved. The *Goudy* alienation argument, addressed in detail by others, need not be repeated here.

In *United States v. Nice*, 241 U.S. 591 (1916), a case involving a federal prosecution for the sale of liquor to a tribal member with a 1902 trust patent, the United States only indirectly touched on this aspect of the General Allotment Act and the status of the individual:

[C]ongress by this very act of 1887 expressly retained control over the allottee Indian's land by *restrictions of alienation and trusteeship* . . . The State, having *no power to tax* these Indian [trust] allotments, had no particular interest in the Indian's welfare [I]t was well established that State laws relating to *taxation* of his [trust] property did not apply

Br. of the United States at 26, 21, 12, *Nice* (No. 681) (emphasis added).

The Court in *Nice* referred to this aspect of the General Allotment Act when it described the holding in *Rickert*:

The act of 1887 came under consideration in *United States v. Rickert*, 188 U.S. 432, a case involving the power of the State of South Dakota to tax allottees under that act, according to the laws of the State, upon their allotments, the permanent improvements thereon and the horses, cattle and other personal property issued to them by the United States and used on their [trust] allotments, and this court, after reviewing the provisions of the act and saying, p. 437, "These Indians are yet wards of the Nation, in a condition of pupillage or dependency, and have not been discharged from that condition," held that the State was *without power to tax* the [trust] lands and other property, because the same were being held and used in carrying out a policy of the Government

Nice, 241 U.S. at 600-601 (emphasis added).

Two years later, the United States was more succinct when it argued another tax exemption issue in *United States v. McCurdy*, 246 U.S. 263 (1918):

Partial emancipation from the Federal guardianship, accompanied by restricted ownership of land *for a limited period*, as a method of educating and preparing the Indians for the duties of civilized life, was adopted by Congress at an early date and has become a settled national policy In *United States v. Rickert*, 188 U.S. 432, it was decided that *trust* allotments and personal property issued to Indian allottees could not be taxed by a State because this would be "to tax an instrumentality employed by the United States for the benefit and control of this dependent race"

Br. for the United States at 9, 11, 12, *McCurdy* (No. 685) (emphasis added).

In *McCurdy*, the United States argued that land purchased with trust funds for an Osage Indian, as evidenced by a restrictive deed, should not be taxable by the State of Oklahoma. The *McCurdy* Opinion rejected the tax exemption argument of the United States in no uncertain terms. At the same time, the Court clearly restated the basis of *Rickert*:

There is also a *clear distinction* between the present case and those like *United States v. Rickert*, 188 U.S. 432, 23 Sup.Ct. 478, 47 L.Ed. 532, where it was sought to tax property, *the legal title of which was in the United States* and which was held by it for the benefit of Indians.

McCurdy, 246 U.S. at 272 (emphasis added). Nothing in *United States v. Nice*, *supra*, was argued or cited by the United States and *Nice* did not figure in the Opinion of the Court in *McCurdy*, and correctly so.

A case more directly on point reached this Court in 1939. In *Board of Comm'rs of Jackson County, Kansas v. United States*, 308 U.S. 343 (1939), the United States

equated a General Allotment Act trust patent with the exemption from taxation:

The *trust patents* issued in fulfillment of that treaty and pursuant to the General Allotment Act of 1887 [24 Stat. 388 (sec. 5), as amended by Act of May 8, 1906, c. 2348, 34 Stat. 182] bound by the United States to convey the land "free of all charge or incumbrance whatever" at the end of the *trust period*. Such [trust] *patents* have uniformly been construed to grant to the Indians a broad exemption from all forms of taxation effecting the land.

Br. for the United States at 6-7, *Board of Comm'rs of Jackson County, Kansas v. United States* (No. 1728) (emphasis added).

Although *Board of Comm'rs of Jackson County, Kansas* only involved the question of whether interest should be awarded when taxes were erroneously assessed, the opinion mentions the General Allotment Act and reflects the understanding of that time:

The land which gave rise to this controversy, situated in Jackson County, Kansas, was [trust] patented under the General Allotment Act of February 8, 1887, 24 Stat. 388, 25 U.S.C. § 348. In pursuance of this Act, the United States agreed to hold the land for twenty-five years under the restrictions of the 1861 Treaty, subject to extension at the President's discretion

In this legislative setting, the Secretary of the Interior in 1918, over the objection of M-Ko-Quah-Wah, cancelled her outstanding *trust patent* and in its place issued a *fee simple patent*. This was duly recorded in the Registry of Deeds for Jackson County. In consequence Jackson County in 1919 began to subject the land to its *regular property taxes*. It continued to do so as long as this *fee simple patent* was left undisturbed by the United States. . . . Jackson County in all innocence acted in reliance on a *fee patent* given under the hand of the President of the United States. . . . Here is a long, unexcused delay

in the assertion of a right for which Jackson County should not be penalized. By virtue of the *most authoritative semblance of legitimacy under national law*, the land of M-Ko-Quah-Wah and the lands of other Indians had become part of the economy of Jackson County. For eight years after Congress had directed attention to the problem, those specially entrusted with the intricacies of Indian law did not call Jackson County's action into question. Whatever may be her unfortunate duty to restore the taxes which she had *every practical justification* for collecting at the time, no claim of fairness calls upon her also to pay interest for the use of the money which she *could not* have known was not properly hers.

Board of Comm'rs, 308 U.S. at 348-349, 352-353 (emphasis added).

In 1943, in a most instructive Minnesota case that involved a special modification of the twenty-five year trust limitation of the General Allotment Act, the United States recounted to this Court that the General Allotment Act "has been *uniformly construed* as conferring upon the Indians a vested 25-year tax exemption. . . ." and the United States conceded that subsequent to that period, the land was legally taxable. Br. for the United States at 17, 43, *Mahnomen County v. United States*, 319 U.S. 474 (1943) (No. 684) (emphasis added). The *Mahnomen* decision reflects this important concession in no uncertain terms:

It is *conceded* that any limitation on the County's power to tax *expired* in 1928 with the termination of the twenty-five year trust described below.

Mahnomen, 319 U.S. at 475 (emphasis added).

Most of the important early cases of this Court are discussed in detail in the Brief for the United States, *Mahnomen*, No. 684. Although *Mahnomen* is a Minnesota case decided by this Court, and although it specifically deals with the Nelson Act and the taxation of real property owned by tribal members, *the United States*

neglected to cite or discuss it in the court of appeals. Similarly, the court of appeals mentioned *Mahnomen* only in passing, as a case that simply suggested that the land might only be free from taxation during the original trust period," and then cited the dissent for that proposition. *Leech Lake Band of Chippewa Indians v. Cass County, Minnesota*, 108 F.3d 820, 823 (8th Cir. 1997), Pet. App. 6. In this respect, the decision of the panel majority is in further conflict with a decision of this Court, as a thorough reading of *Mahnomen* attests.⁵

In 1952, the United States in *Bailess v. Paukune*, 344 U.S. 171 (1952), generally described two instances where it deemed taxation to be "forbidden by the General Allotment Act":

[W]hether under trust patents or under fee patents with restrictions upon alienation

Br. for the United States at 2, *Bailess v. Paukune* (No. 242) (emphasis added).

Bailess involved the taxation of land of an alleged Indian widow, who in due course was to receive a "fee patent" for the interest she inherited from her husband in a trust allotment. The Court concluded her interest was taxable if she was a non-Indian and in the process noted:

This allotment was made under the General Allotment Act of February 8, 1887, 24 Stat. 388, 389. . . . No fee patent to the land has issued to *Paukune*, to his widow, or to the son. The trust period of twenty-five years has from time to time been extended. In other words, the United States still holds the land in trust for *Paukune* and his heirs. . . .

Bailess, 344 U.S. at 171-172 (emphasis added).

In 1956, in an income tax case that involved the General Allotment Act, as amended by the Burke Act of

⁵ See also *Nichols v. Rysavy*, 809 F.2d 1317 (8th Cir. 1987), cert. denied, 484 U.S. 848 (1987), and *County of Thurston v. Andrus*, 586 F.2d 1212 (8th Cir. 1978), cert. denied, 441 U.S. 952 (1979).

1906, 34 Stat. 182, the United States succinctly stated that:

[T]his provision was undoubtedly intended to make it clear that Indian lands transferred in fee to the Indians would thereafter be subject to state and local taxation

Br. for the Pet'r at 13 n. 4, *Squire v. Capoeman*, 351 U.S. 1 (1956) (No. 134) (emphasis added).

The opinion of the Court accepted the basic premise of the argument:

The Government argues that this amendment was directed solely at permitting state and local taxation after a transfer in fee, but there is no indication in the legislative history of the amendment that it was to be so limited. . . . The literal language of the proviso evinces a congressional intent to subject an Indian allotment to all taxes only after a patent in fee is issued to the allottee.

Squire, 351 U.S. at 7-8 (emphasis added).

In *United States v. Mason*, 412 U.S. 391 (1973), the United States noted that the Court in *Squire*:

[R]elied on language in an amendment to the General Allotment Act providing for taxation of the land after the allottee receives a patent in fee . . . [and] held that an amendment to the General Allotment Act created a tax exemption by implication, and that it required the return of the trust property without encumbrances at the end of the trust period . . . and provided for taxation after the termination of the trust.

Br. for the United States at 9-10, 17, *Mason* (Nos. 72-654, 72-606) (emphasis added).

The Court in *Mason* agreed:

Moreover, the *Squire* decision rested heavily on the provision in the General Allotment Act providing for the removal of all restrictions as to sale, encum-

brance, or taxation' *when Indian property is granted in fee. . . .*

Mason, 412 U.S. at 396 (emphasis added).

Even Mr. Hobbs, arguing for the tribal respondents in oral argument, stated:

The next thing that happens is that in 1906 Congress amends the General Allotment Act, and it says that—for the first time adds the idea that the trust period can end sooner than the 25 years intended if the Indian becomes competent sooner than that time. And it says that after he reaches the point of competency, the trust will end and he gets his land, and all restrictions as to alienation and *taxation are lifted*. This implies that Congress thought that the land was free of tax up to that point and well so. Over sixty years ago this Supreme Court, in 1903, had held that a restriction on alienation added up to a tax exemption. So, Congress assumed on very good authority in 1906 that the restriction on alienation was the equivalent of a tax exemption.

Tr. of Oral Argument at 38, *Mason* (Nos. 72-654 72-606) (emphasis added).

Most recently, in *United States v. Mitchell*, 445 U.S. 535 (1980), the United States reviewed the entire history of the General Allotment Act. Again, the United States told this Court the exemption to state taxation coincided with the trust period:

The General Allotment Act . . . for the limited purpose of (a) restraining improvident alienation of the land by the allottees and (b) affording an immunity from state taxation for the period *during* which the legal title remained in the United States. . . .

Br. for the United States at 24, *Mitchell* (No. 81-1748) (emphasis added). In oral argument, Mr. Claiborne, arguing for the United States, said the same thing:

That statute contemplated a scheme whereby the land of the reservation would be divided among the Indians within 25 years, and in the *meantime*, the

United States was simply to hold title in trust solely for the *purpose* of preventing state taxation, it being legal title in the United States and therefore exempt from state taxation.

Tr. of Oral Argument at 14, *Mitchell* (No. 81-1748) (emphasis added).

This Court agreed:

[W]hen Congress enacted the General Allotment Act, it intended . . . to prevent alienation of the land and to ensure that allottees would be immune from state taxation.

Mitchell, 445 U.S. at 544. At the end of this conclusion, the Court quoted at length and added emphasis to the remarks of Representative Skinner, the sponsor in the House of Representatives: ". . . 'land is made *inalienable and non-taxable* for a sufficient length of time.' . . ."
Mitchell, 445 U.S. at 544, n. 5. In dissenting, Justice White described the holding of the Court in the same terms:

The Court holds, however, that the 'trust' established by § 5 is not a trust as that term is commonly understood, and that Congress had no intention of imposing full fiduciary obligations on the United States. Congress' purposes, it is said, were narrower: to impose a restraint on alienation by Indian allottees while ensuring *immunity from state taxation during the period* of the restraint.

Mitchell, 445 U.S. at 546, 547 (White, J., dissenting) (emphasis added). It is significant that the arguments the United States submitted in *Mitchell* were presented subsequent to the decisions of this Court that the United States now advances to undermine the same position.

C. All Related Opinions Reflect That The General Allotment Act And All Other Legislation Were Clearly Understood To Generally Authorize The Taxation Of Fee Patent Land.

Immediately after the passage of the 1887 Act, the Secretary of the Interior requested and received an opinion

from the Attorney General of the United States. Among other things, this opinion clearly ties the tax exemption to the twenty-five year trust period.

I am also of the opinion that the allotment lands provided for in the act of 1887 are exempt from State or Territorial taxation upon the ground above stated with reference to the act of 1884, namely, that the lands covered by the act are held *by the United States for the period of twenty-five years in trust for the Indians*, such trust being an agency for the exercise of a Federal power, and therefore outside the province of State or Territorial authority.

19 Op. Atty. Gen. 161, 169 (1888) (emphasis added). Later, opinions from the Department of the Interior reinforced this accepted construction. 30 L.D. 258, 266-267 (1900), 50 L.D. 591 (1924), 53 L.D. 107 (1930), 53 L.D. 133 (1930). With specific reference to the original Nez Perce Indian Reservation, in 1930 the Interior Solicitor characterized the issue as follows:

[T]he subsequent enactment of the general allotment act of 1887, embracing within its scope reservations such as the Nez Perce, created by treaty stipulation, and the making of allotments thereunder to the Indians with their consent as manifested, not only by the selections made by them, but by the subsequent agreement of 1894, make it plain that the provisions of the original treaty of 1863 relied upon as creating the tax exemption here claimed, were superseded by the provisions of the general allotment act.

The rights of the Nez Perce Indians with respect to the lands allotted to them, are thus determined by the general allotment act of 1887 and as that Act contains no provision exempting the allotted lands from taxation after issuance of fee simple patents upon expiration of the trust period, I am clearly of the opinion that such lands thereupon become subject to the taxing power of the State.

53 L.D. 133, 136 (1930), *Amici Co. Pet. App. 6a.*

This construction of the 1887 Act is repeatedly reflected in every related opinion of the Department of the Interior thereafter until 1989. On April 21, 1989, the 1979 opinion that restated this position was simply rescinded. After citing several cases decided by this Court in the 1970s, an Associate Solicitor of the Department of the Interior reasoned that:

[L]anguage in some of those decisions suggests the state is on weaker ground when it attempts to tax Indian ownership of land. . . .

Memorandum at 1, BIA, IA. No. 0943, April 21, 1989. The decision of this Court in *Yakima* authoritatively resolved that question.

In this case, the Court should make clear that the principles recognized in *Goudy* and *Yakima* were not intended to be narrowly construed and severely restricted in application.

II. THROUGH THE NELSON ACT, CONGRESS LEFT LANDS IN MINNESOTA FREELY ALIENABLE AND TAXABLE (ONLY EXCEPTING THOSE HELD IN TRUST).

As we have noted above, ten *Amici* Counties have particular interest in the faulty analysis of the circuit court. That court's disregard of Congress' special expression of intent for lands in the State of Minnesota has particular impact in those Counties, which have lands similarly affected (and which provide services to those lands and their residents at substantial costs). Indeed, as gambling and tourism oriented facilities proliferated, costs have dramatically increased from temporary visitors.

Historically, the Nelson Act was legislation focused on the reservations within Minnesota. Act of January 14, 1889, ch. 24, 25 Stat. 642. As introduction to this section, we quote the direction of Congress in that Act "for the relief and civilization of the Chippewa Indians in the State of Minnesota." By the Act, a commission was established and sent to Minnesota:

[T]o negotiate with all the different bands or tribes of Chippewa Indians in the State of Minnesota for the *complete cession and relinquishment* in writing of *all their title and interest* in and to all the reservations of said Indians in the State of Minnesota, except the White Earth and Red Lake Reservations,

....

Id. (emphasis added).

The provisions of the Act were specifically implemented through the process of negotiation with the Indians. The Nelson Act also went on to summarize what would be the end result:

[T]he acceptance and approval of such cession and relinquishment by the President of the United States shall, be deemed full and ample proof of the assent of the Indians, and shall operate as a *complete extinguishment of the Indian title* . . .

Id. (emphasis added).

H. R. Exec. Doc. No. 247, 51st Cong., 1st Sess. (1889) which is excerpted in *Amici Co. App.* at 1a-141a, sets forth the history of this process as fully implemented.

For the convenience of the Court, the first part of the *Amici County Appendix* reproduces in its entirety the textual section of H. R. Exec. Doc. No. 247 at 1-27, *Amici Co. App.* at 1a-54a. The balance of H. R. Exec. Doc. No. 247 consists of the transcripts of all of the negotiations. H. R. Exec. Doc. No. 247 at 66-193. The *Amici Counties* have reproduced the complete Leech Lake portion of the negotiations because that is the area directly involved in this case. H. R. Exec. Doc. No. 247 at 117-148, *Amici Co. App.* at 54a-141a. We also discuss, but do not reproduce, related aspects of the Mille Lac negotiations. The balance of the negotiations generally reflect the same or similar principles and understandings, but they are not reproduced in the Appendix.

Early on, the Eighth Circuit Court of Appeals concisely summarized the history of the Nelson Act set forth

in H. R. Exec. Doc. No. 247 and subsequent related legislation in a tax related case that was not mentioned by the court below. *Morrow, County Auditor v. United States*, 243 F. 854 (8th Cir. 1917). In 1917, the entire concept was recent history and the manner in which the court set forth the issue at that time is significant:

To execute that part of the plan, the method laid down in the recently enacted General Allotment Act was deemed suitable. Therefore it was, by reference instead of repetition, incorporated into the Nelson Act as a part of that agreement. The General Act, § 5, set this forth in detail. It provided that the title should be held by the President in trust for 25 years free from "all charge or incumbrance," which meant, in effect, freedom from taxation.

If the Nelson Act had set out in detail the terms upon which the allotments were to be made, it could not be successfully contended that those terms were not a part of the agreement, or that any title or rights resulting therefrom when once vested would not be free from alteration. Can this be less true because the allotment method is incorporated by reference? This incorporation of the method outlined in the General Allotment Act by reference made that method part of the agreement with precisely the same effect as though its terms had first found expression by being set out in full as a section of the Nelson Act. The General Allotment Act was not made applicable to these allotments in any other sense. They were not under the authority of the General Allotment Act at all, but "in conformity with" it under the authority of the Nelson Act.

If there were any doubt as to the status of this matter, the understanding of the Indians as to the agreement would control. *Kansas Indians*, 5 Wall 737, 18 L.Ed. 667; *Jones v. Meehan*, 175 U.S. 1, 20 Sup. Ct. 1, 44 L. Ed. 49. *Several hundred copies of both the Nelson and of the General Allotment Acts were distributed among the Indians and were*

discussed by them and the commissioners as constituting parts of one agreement. As to these very matters of title and taxation, the Indians were very inquisitive and solicitous. The commissioners gave them the direct assurance that their allotted lands would not be taxed for 25 years "because the President holds this land in trust for you," and it was so understood by them.

A trust patent in exact compliance with such understanding and agreement was issued this Indian, and under it he has taken and holds this land. His rights are vested and are impervious to alteration against his will except through the sovereign power of eminent domain. One of these rights was freedom from state and location taxation.

Id. at 858 (emphasis added).

There is no indication that *Morrow* received any consideration in the decision of the panel majority.

In *Leech Lake*, the circuit decision committed two tiers of analytical error leading to its decision that frustrates the intent of Congress with respect to Minnesota. The decision also severely impacts funding for services many *Amici* Counties provide to these same lands.

The first error of the circuit court which has been discussed, *supra* at 11-21, was ignoring that it was the policy of Congress to make fee lands, once freely alienable, taxable as well. Note: This has the practical effect of allowing (funding) and encouraging state and county services.⁶

⁶ As the County noted in *Yakima*:

[T]he outcome of this case will also affect a multitude of other states, counties, school districts, fire districts, and countless other entities and the revenue they may derive to defray the cost of Indian reservation services enjoyed by Indians and non-Indians alike. The fiscal importance of the taxing authority involved here, and the proper balance of its consequences as between Indian and non-Indian governments, is plainly a policy matter which should be resolved by the elected represent-

On another level, the court failed to recognize that the Nelson Act is a perfect illustration of the implementation of such policy and clear intent of Congress. If appropriate consideration is given to both the terms of that specific act, the actual understanding of both sides, which were communicated through protracted negotiations, and the understood effect, the inescapable conclusion is that the decision below is wrong.

The intent of Congress is summarized in the above-quoted sections of the Act. This is further confirmed by the legislative history. For example:

It appears by the report of the Commission that it sought and obtained the assistance of Bishop Whipple and Archbishop Ireland in its labors, and that all that was done was conducted in a spirit of fairness towards the Chippewas. There were distributed among them 500 copies of the act of January 14, 1889, and several hundred copies of the general allotment act of February 8, 1887.

Councils were held at Red Lake, White Earth, Gull Lake, Leech Lake, Cass Lake, Lake Winnibagoshish, White Oak Point, Mille Lac, Grand Portage, Bois Forte and Vermillion Lake, and Fond du Lac.

H.R. Exec. Doc. 247, *Amici Co.* App. at 5a.

The commission reports that although the Indians have decided to take allotments on their reservations, it is believed that many may be induced to remove to White Earth, and for this reason it is not prudent to urge individual allotments elsewhere than on the White Earth and Red Lake Reservations at present.

The removal of those who will go to White Earth will take place as soon as provisions can be made

atives of the People, with due regard to all those affected. The legislative process is designed for such purposes. The judicial process is not.

Reply Br. of Pet'rs/Cross Resp'ts County of Yakima at 18, *Yakima Indian Nation* (Nos. 90-408 and 90-577).

for their subsistence. It will be of the greatest benefit to the Indians and to the State to have the removal made.

Id. at 12a.

The commissioners state that it is important that the four townships of pine land on the White Earth Reservation should be early estimated and sold, as the timber is liable to be stolen or burned.

Id. at 12a.

I fully concur in the suggestion of the commissioners, that the ceded lands of the White Earth Reservation already surveyed should be disposed of under the terms of the act, at as early a date as possible, but I do not see how the swamp lands referred to and reported to be valuable chiefly for cedar and tamarac can be withheld from sale as requested without further legislation in view of the last clause of section 4 of the act, which reads as follows:

All other lands acquired from the said Indians on said reservations other than pine lands are for the purposes of this act termed "agricultural lands."

And section 6 provides specifically the manner in which unallotted and unreserved agricultural lands shall be disposed of.

Id. at 12a-13a.

Before the ceded lands within any of the reservations can be disposed of as contemplated in the act, all of said ceded lands must be surveyed as the public lands are surveyed, after which they are to be carefully examined in 40-acre lots, by competent and experienced examiners to be appointed for that purpose, and classified into "pine lands" and "agricultural lands," the pine lands are then to be valued and listed, etc. (section 4), and finally proclaimed as in market and offered for sale in the manner prescribed in section 5.

The agricultural lands not allotted nor reserved for the use of the Indians, after having been surveyed,

are to be advertised for thirty days and disposed of to actual settlers under the provisions of the homestead laws, each settler being required to pay \$1.25 per acre for the lands so taken by him.

Id. at 18a-19a.

That nothing should be omitted that could enlighten the Indians as to the intent of the Government, we had printed 500 copies of the act of January 14, 1889, and several hundred of the "Act to provide for the allotment of lands in severalty to Indians," etc., approved February 8, 1887. These we caused to be distributed among the missionaries, teachers, and other employees of the Government, as well as traders, mixed bloods, and Indians who read the English language.

Id. at 26a.

They all earnestly plead for saw-mills, cattle, agricultural and mechanical implements, which they must have or they can make no substantial progress. They must be assisted in breaking and fencing land, building houses, and with provisions, until they can sustain themselves. They are no longer tribal Indians, but citizens at present helpless, and must be treated as such.

Id. at 48a.

The intent of Congress was not only understood but agreed to by the Indians. Records were kept of the negotiating sessions, which were made part of the Report to accompany the Nelson Act, largely contradicting the circuit court's claim that "The details of the negotiations with the Leech Lake Band are unclear," *Leech Lake*, 108 F.3d at 822. See *Amici Co. App.* at 54a-141a.

We shall also use the Mille Lacs as a further example, but the minutes of each are included in H. R. Exec Doc. No. 247. Councils with the Bands ranged up to eleven days (Leech Lake). The majority, however, took four days, as did the Mille Lacs. The commission's negotiations followed a similar format with each Band.

First, the Act was read and carefully explained in its entirety:

Commissioner Whiting then read the act of Congress under which the commission proceeded, it being interpreted phrase by phrase to the Indians, after which he continued:

This paper is tiresome to you to listen to all at once. You are not expected to understand all of its provisions by the reading of it, but you will find that the commission will listen to your questions, and answer all of them to your satisfaction, explaining everything in the bill that you may not understand.

Tr. of First Council with Mille Lac Indians, Mille Lac Reservation (October 2, 1889), H. R. Exec. Doc. No. 247, 51st Cong., 1st Sess. at 164 (1889).

Second, the proceedings went on for many days. Frequently, questions arose as to whether the Indians would be subject to state laws. One particularly notable example, for reasons discussed below, was hunting and fishing:

In regard to hunting deer, that is a matter for the Legislature of the State to determine. . . . wherever the white man may hunt, your young men will have the same right to do so.

Tr. of Third Council with Mille Lac Indians (October 4, 1889), H.R. Exec. Doc. No. 247, 51st Cong., 1st Sess. at 169 (1889).

Note, this is of particular interest since the hunting and fishing privileges were considered an important part of a claim of Indian title, often the most important. Still, these important rights were extinguished by the cession of the Nelson Act. The panel majority disregarded not only precedent of the Eighth Circuit which so held but decisions of this Court to the same effect confirming the total extinguishment, *e.g.*, *Red Lake Band of Chippewa Indians v. Minnesota*, 614 F.2d 1161 (8th Cir. 1980) (*per curiam*); *White Earth Band of Chippewa Indians v. Alexander*, 683 F.2d 1129 (8th Cir. 1982).

This Court, in a different context, referred to the importance of hunting and fishing to Indians, access to which was "not much less necessary to the existence of the Indians than the atmosphere they breathed." *United States v. Winans*, 198 U.S. 371, 381 (1905). See also, *Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985) (dissent referring to them as "valuable property rights," citing 473 U.S. 775 n.1).

The effect of the same Nelson Act cessions in extinguishing such hunting and fishing rights—even where included in treaties had been stated by other panels of the circuit court (cited above), and, most importantly, this Court agreed with that conclusion.⁷ It is noteworthy that those cases were not even discussed, much less distinguished, by the circuit court in the decision reviewed here.

It is easiest to summarize the most important part of such cases by using the language of this Court:

In *Red Lake Band*, a band of Chippewa Indians had ceded "all right, title, and interest in and to" two parcels of land in agreements ratified by Congress in 1889 and 1904. 614 F.2d, at 1162. The Court of Appeals for the Eighth Circuit ruled that the Band had thereby given up its tribal "rights to hunt, fish, trap and gather wild rice free of the state's regulation of such activities," despite the Band's claim that diminishment of the reservation boundaries in the 1889 and 1904 Acts did not abrogate such rights absent explicit reference. *Ibid.*

Klamath, 473 U.S. 753, 764 n.14.

As the body of this Court's decision notes, the decision of the Eighth Circuit (that all rights had been extinguished through the Nelson Act process) was in conflict

⁷ The author of the circuit decision, when a district judge, also declined to apply this reasoning, see, *Mille Lac Band of Chippewa Indians v. Minnesota*, 861 F. Supp. 784 at 833 (D. Minn. 1994), as had one other district judge before *Klamath*.

with the contrary decision of the Ninth Circuit which this Court reversed in *Klamath*, 473 U.S. 753.

At the conclusion of the extensive Mille Lacs Nelson Act negotiation and several days' explanation by the commission, the Indians individually signed an express extinguishment reading in part:

[A]nd we do also hereby *grant, cede, and relinquish* to the United States for the purposes and upon the terms stated in said act, *all our right, title, and interest* in and to the lands reserved by us [45] and described in the first article (ending with the words "to the place of beginning") of the treaty with the Chippewas of the Mississippi, proclaimed April 18, 1867 (16 Stat., p. 7-9), and also, to the aforesaid executive addition thereto made and described in an executive order dated October 19, 1873; . . . we do also hereby *forever relinquish to the United States the right of occupancy on the Mille Lac Reservation*, reserved to us by the twelfth article of the treaty of May 7, 1864 (13 Stat., p. 693).

Signature Rolls, Mississippi Chippewa Indians, Mille Lacs Bands, H.R. Exec. Doc. No. 247, 51st Cong., 1st Sess. 45-46 (1889) (emphasis added).

As quoted above at 22, once accepted by the President, this worked a "complete extinguishment." Congress' intended result was to make all fee lands fully part of these states and counties with no tax or other exemption. The Indians understood and agreed. Given that the counties have performed their obligations consistent with this understanding, it is both fair and proper that taxes be paid on fee lands to which these services are provided.

CONCLUSION

For the foregoing reasons, as well as those stated in the Brief for Cass County and the Brief of *Amici* States, the decision of the Eighth Circuit Court of Appeals should be reversed.

Respectfully submitted,

JAMES M. JOHNSON
Attorney at Law
1110 S. Capitol Way
Olympia, WA 98501
(360) 357-3104

TOM D. TOBIN *
TOBIN LAW OFFICES, P.C.
422 Main Street
P.O. Box 730
Winner, SD 57580
(605) 842-2500

* *Counsel of Record*

(11)

DEC 15 1997

CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1997

CASS COUNTY, *et al.*

v.

Petitioners,

LEECH LAKE BAND OF CHIPPEWA INDIANS,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF FOR LEWIS COUNTY, IDAHO;
AITKIN COUNTY, BENTON COUNTY,
CROW WING COUNTY, ISANTI COUNTY,
KANABEC COUNTY, MAHNOMEN COUNTY,
MILLE LACS COUNTY, MORRISON COUNTY,
PINE COUNTY, AND SHERBURNE COUNTY,
MINNESOTA; GLACIER COUNTY, LAKE COUNTY,
AND ROOSEVELT COUNTY, MONTANA;
LYMAN COUNTY, SOUTH DAKOTA;
DUCHESNE COUNTY AND UINTAH COUNTY, UTAH;
AMICI CURIAE, IN SUPPORT OF PETITIONERS,
CASS COUNTY, MINNESOTA, *ET AL.*

JAMES M. JOHNSON
Attorney at Law
1110 S. Capitol Way
Olympia, WA 98501
(360) 357-3104

TOM D. TOBIN *
TOBIN LAW OFFICES, P.C.
422 Main Street
P.O. Box 730
Winner, SD 57580
(605) 842-2500

* *Counsel of Record*

[Additional Counsel Listed on Inside Cover]

39 p2

KIMRON TORGERSON
Lewis County Prosecuting
Attorney
P.O. Box 398
Nezperce, ID 83543
(208) 937-2271

BRADLEY C. RHODES
Aitkin County Attorney
209 Second Street, N.W.
Aitkin, MN 56431
(218) 927-7347

MICHAEL JESSE
Benton County Attorney
531 Dewey Street
Box 129
Foley, MN 56329
(320) 968-6254

DONALD F. RYAN
Crow Wing County Attorney
326 Laurel St., Courthouse
Brainerd, MN 56401
(218) 828-3952

JEFFREY EDBLAD
Isanti County Attorney
555 18th Avenue, S.W.
Cambridge, MN 55008
(612) 689-2253

NORMAN LOREN
Kanabec County Attorney
18 Vine Street North—
Courthouse
Mora, MN 55051-1351
(320) 679-2870

ERIC BOE
Mahnomen County Attorney
P.O. Box 439
Mahnomen, MN 56557
(218) 935-2378

JENNIFER FAHEY
Mille Lacs County Attorney
635 Second Street, S.E.
Milaca, MN 56353
(320) 983-8305

CONRAD FREEBERG
Morrison County Attorney
Morrison County Government
Center
213 1st Avenue SE
Little Falls, MN 56345
(320) 632-0190

JOHN CARLSON
Pine County Attorney
315 Sixth Street—Courthouse
Pine City, MN 55063
(320) 629-6781

WALTER KAMINSKY
Sherburne County Attorney
13880 Highway 10
P.O. Box 318
Elk River, MN 55330-1692
(612) 241-2565

LARRY EPSTEIN
Glacier County Attorney
512 East Main Street
Cut Bank, MT 59427-3016
(406) 873-2277

DEBORAH KIM CHRISTOPHER
Lake County Attorney
Lake County Courthouse
106 4th Ave. E
Polson, MT 59860-2125
(406) 883-7245

JAMES R. PATCH
Roosevelt County Attorney
400 Second Avenue South
Wolf Point, MT 59201-1600
(406) 653-2653

DALLAS E. BROST
Lyman County States Attorney
P.O. Box 38
100 South Main
Kennebec, SD 57544
(605) 869-2294

HERBERT WM. GILLESPIE
Duchesne County Attorney
500 East 100 South
P.O. Box 206
Duchesne, UT 84021
(801) 738-2435

JOANN B. STRINGHAM
Uintah County Attorney
152 East 100 North
Vernal, UT 84078
(801) 781-5436

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF <i>AMICI CURIAE</i> COUNTIES	1
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. THE OPINION OF THE COURT OF AP- PEALS IS CONTRARY TO A TRADITION OF TAXATION AND CONFLICTS IN PRIN- CIPLE WITH THE RELEVANT DECISIONS OF THIS COURT	6
A. Introduction	6
B. The General Allotment Act And All Other Legislation Have Been Consistently Con- strued To Generally Authorize The Taxation Of Fee Patent Land	11
C. All Related Opinions Reflect That The Gen- eral Allotment Act And All Other Legisla- tion Were Clearly Understood To Generally Authorize The Taxation Of Fee Patent Land	19
II. THROUGH THE NELSON ACT, CONGRESS LEFT LANDS IN MINNESOTA FREELY ALIENABLE AND TAXABLE (ONLY EX- CEPTING THOSE HELD IN TRUST)	21
CONCLUSION	30
APPENDIX	
H.R. Exec. Doc. No. 247, 51st Cong., 1st Sess. (1889)	separately bound

TABLE OF AUTHORITIES

CASES	Page
<i>Bailess v. Paukune</i> , 344 U.S. 171 (1952)	16
<i>Board of Comm'rs of Jackson County, Kansas v. United States</i> , 308 U.S. 343 (1939)	13, 14, 15
<i>County of Oneida v. Oneida Indian Nation</i> , 470 U.S. 226 (1985)	10
<i>County of Thurston v. Andrus</i> , 586 F.2d 1212 (8th Cir. 1978), cert. denied, 441 U.S. 952 (1979)	16
<i>Draper v. United States</i> , 140 U.S. 240 (1891)	11
<i>Goudy v. Meath</i> , 203 U.S. 146 (1906)	5, 10, 12, 21
<i>Larkin v. Paugh</i> , 276 U.S. 431 (1928)	10
<i>Leech Lake Band of Chippewa Indians v. Cass Co., Minn.</i> , 108 F.3d 820 (8th Cir. 1997), cert. granted (U.S. October 31, 1997) (No. 97-174) ..	7, 16, 24, 27
<i>Mahnomen County v. United States</i> , 319 U.S. 474 (1943)	15, 16
<i>Mille Lacs Band of Chippewa Indians v. Minnesota</i> , 861 F. Supp. 784 (D. Minn. 1994)	29
<i>Moe v. Confederated Salish & Kootenai Tribes</i> , 425 U.S. 463 (1976)	10
<i>Morrow, County Auditor v. United States</i> , 243 F. 854 (8th Cir. 1917)	23, 24
<i>Nichols v. Rysavy</i> , 809 F.2d 1317 (8th Cir. 1987), cert. denied, 484 U.S. 848 (1987)	16
<i>Oregon Fish & Wildlife Dept. v. Klamath Tribe</i> , 473 U.S. 753 (1985)	29, 30
<i>Pennock v. Board of County Comm'rs of Franklin County</i> , 103 U.S. 44 (1881)	11
<i>Red Lake Band of Chippewa Indians v. Minnesota</i> , 614 F.2d 1161 (8th Cir. 1980)	28, 29
<i>South Carolina v. Catawba Indian Tribe, Inc.</i> , 476 U.S. 498 (1986)	10
<i>Squire v. Capoeman</i> , 351 U.S. 1 (1956)	17
<i>Stevens v. C. I. R.</i> , 452 F.2d 741 (1971)	7
<i>United States v. Mason</i> , 412 U.S. 391 (1973)	17, 18
<i>United States v. McCurdy</i> , 246 U.S. 263 (1918)	13
<i>United States v. Michigan</i> , 106 F.3d 130 (6th Cir. 1997), pet. for cert. filed (U.S. June 30, 1997) (No. 97-14)	7

TABLE OF AUTHORITIES—Continued

	Page
<i>United States v. Mitchell</i> , 445 U.S. 535 (1980)	18, 19
<i>United States v. Nice</i> , 241 U.S. 591 (1916)	12, 13
<i>United States v. Rickert</i> , 188 U.S. 432 (1903)	11, 12, 13
<i>United States v. Winans</i> , 198 U.S. 371 (1905)	29
<i>White Earth Band of Chippewa Indians v. Alexander</i> , 683 F.2d 1129 (8th Cir. 1982)	28
<i>Yakima County v. Yakima Indian Nation</i> , 502 U.S. 251 (1992)	passim
STATUTES	
General Allotment Act of 1887 (24 Stat. 388)	passim
Nelson Act of January 14, 1889, ch. 24 (25 Stat. 642)	passim
Great Sioux Act of 1889 (25 Stat. 896)	9
Joint Resolution of June 19, 1902 (32 Stat. 744)	8
Burke Act of 1906 (34 Stat. 182)	16
Act of February 14, 1923 (42 Stat. 1246)	25
U.S.C. § 335	8
Indian Reorganization Act of 1934 (48 Stat. 984) ..	8, 10
18 U.S.C. § 1151	10
25 U.S.C. § 177	10
MISCELLANEOUS	
H.R. Exec. Doc. No. 247, 51st Cong., 1st Sess. (1889)	passim
19 Op. Atty. Gen. 161 (1888)	20
30 L.D. 258 (1900)	20
50 L.D. 591 (1926)	20
53 L.D. 107 (1930)	20
53 L.D. 133 (1930)	20
25 C.F.R. 151	8
Memorandum BIA, IA. No. 0943, April 21, 1989	21
Memorandum Opinion of the Associate Solicitor, Dept. of Interior, Division of Indian Affairs, March 22, 1979	7
Brief for the United States, <i>Bailess v. Paukune</i> , 344 U.S. 171 (1952) (No. 242)	16
Brief for the United States, <i>Board of Comm'rs of Jackson County, Kansas v. United States</i> , 308 U.S. 343 (1939) (No. 1728)	14

TABLE OF AUTHORITIES—Continued

	Page
Brief for the United States, <i>Leech Lake Band of Chippewa Indians v. Cass Co., Minn.</i> , 108 F.3d 820 (8th Cir. 1997) (No. 95-4263)	7, 9
Brief in Opp'n, <i>Leech Lake Band of Chippewa Indians v. Cass Co., Minn.</i> , 108 F.3d 820 (8th Cir. 1997) (No. 95-4263)	9
Brief for Lewis County, Idaho, <i>et al. Amici Curiae</i> , in Support of Petitioners, Cass County, Minnesota, <i>et al.</i> , <i>Cass County, Minnesota v. Leech Lake Band of Chippewa Indians</i> (No. 97-174) (August 29, 1997)	6
Brief for the United States, <i>Mahnomen County v. United States</i> , 319 U.S. 474 (1943) (No. 12340, 12376)	15
Brief for the United States, <i>United States v. Mason</i> , 412 U.S. 391 (1973) (Nos. 72-654, 72-606)	17
Brief for the United States, <i>United States v. McCurdy</i> , 246 U.S. 263 (1918) (No. 685)	13
Brief for the United States, <i>United States v. Mitchell</i> , 445 U.S. 535 (1980) (No. 81-1748)	18
Brief for the United States, <i>Nice v. United States</i> , 241 U.S. 591 (1916) (No. 681)	12
Brief for the United States, <i>United States v. Rickert</i> , 188 U.S. 432 (1903) (No. 216)	11
Brief for Petitioner, <i>Squire v. Capoeman</i> , 351 U.S. 1 (1956) (No. 134)	17
Brief for the United States as <i>Amicus Curiae</i> , <i>Yakima County v. Yakima Indian Nation</i> , 502 U.S. 251 (1992) (Nos. 90-408, 90-577)	3, 9, 10
Reply Brief of Petitioners/Cross Respondents, County of Yakima and Dale A. Gray, Yakima Treasurer, <i>County of Yakima v. Yakima Indian Nation</i> , 502 U.S. 251 (1992) (Nos. 90-408, 90-577)	25
Memorandum for the United States as <i>Amicus Curiae</i> in Support of Petition for Rehearing and Suggestion for Rehearing <i>En Banc</i> , <i>Yakima Indian Nation v. County of Yakima</i> , 960 F.2d 793 (9th Cir. 1992) (No. 88-3926)	3

TABLE OF AUTHORITIES—Continued

	Page
Brief for La Plata County, Colorado, et al. as <i>Amici Curiae</i> in Support of Petitioners, <i>Yakima County v. Yakima Indian Nation</i> , 502 U.S. 251 (1992) (Nos. 90-408, 90-577)	3
Transcript of Oral Argument, <i>United States v. Mason</i> , 412 U.S. 391 (1973) (Nos. 72-654, 72-606)	18
Transcript of Oral Argument, <i>United States v. Mitchell</i> , 445 U.S. 535 (1980) (No. 81-1748)	19
Transcript of Oral Argument, <i>Yakima County v. Yakima Indian Nation</i> , 502 U.S. 251 (1992) (Nos. 90-408, 90-577)	9
F. Cohen, Handbook of Federal Indian Law (1942 ed.)	8
F. Cohen, Handbook of Federal Indian Law (1982 ed.)	8
Conference of Western Attorneys General, <i>American Indian Law Deskbook</i> (1993)	8

IN THE
Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-174

CASS COUNTY, MINNESOTA, *et al.*,
v. *Petitioners,*

LEECH LAKE BAND OF CHIPPEWA INDIANS,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF OF THE
NATIONAL ASSOCIATION OF COUNTIES,
NATIONAL GOVERNORS' ASSOCIATION,
NATIONAL LEAGUE OF CITIES,
NATIONAL CONFERENCE OF STATE LEGISLATURES,
U.S. CONFERENCE OF MAYORS, INTERNATIONAL
CITY/COUNTY MANAGEMENT ASSOCIATION,
INTERNATIONAL MUNICIPAL LAWYERS
ASSOCIATION, AND COUNCIL OF
STATE GOVERNMENTS AS *AMICI CURIAE*
IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state and local governments and officials throughout the United

States.¹ *Amici* and their members have a vital interest in legal issues that affect the powers and responsibilities of state and local governments.

Amici are concerned that serious erosion of *ad valorem* tax bases could result if Tribes can unilaterally assert sovereignty over land previously held by private parties, in derogation of well-established state and local authority to tax real property. The decision below allows Tribes to create a tax-exemption on their own volition simply by purchasing from private parties land that Congress had previously ordered to be sold for the benefit of the Tribes. Tribes have purchased land from non-Indians to develop casinos, hotels, malls and convention centers, asserting that their projects are immune from state and local government real estate taxes. See discussion *infra* at 22-23, 26-27. In addition, in at least one instance, non-Indians have entered into a leaseback arrangement with a Tribe for prime resort property in an effort to avoid state and local taxes. See *id.* at 26.

By allowing Indians a new power unilaterally to expand their federal immunity from state taxation, the decision below also allows Indians to circumvent statutory procedures specifically designed by Congress to govern the reestablishment of federal trust status, 25 U.S.C. § 465, and the Secretary of the Interior's consideration of the impact on state and local governments of removing property from the tax rolls, see 25 C.F.R. § 151.10(e) (implementing 25 U.S.C. § 465 and expressly providing for state and local government comment on "the impact on

¹ Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief *amicus curiae*. Their letters of consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

the State and its political subdivisions resulting from the removal of the land from the tax rolls"). The power asserted by the Tribe to take real estate off the tax rolls thus undermines the longstanding principle of federal superintendence over tribal activities and threatens to cripple the ability of affected communities to fund vital public services such as schools, police and fire protection.

Because of the importance of this issue to state and local governments, *amici* submit this brief to assist the Court in its resolution of the case.

STATEMENT

The court of appeals held that Cass County could not assess *ad valorem* taxes on certain parcels of land located within the boundaries of a Chippewa reservation because the Leech Lake Band had recently repurchased them from private parties. The court reached this result despite the fact that Congress had, in the Nelson Act of 1889, ordered the sale of these parcels to the general public and placed the proceeds of those sales in trust for the Tribe's benefit.

A. Federal Policy to Allot Lands and Assimilate Indians

Congress' decision more than a century ago to alienate the parcels in question from tribal control was part of a major movement in federal Indian policy from the 1880's until the early 1930's—allotment of reservation land to individual Indians with a view toward integration of individual Indians into the expanding non-Indian frontier. When Indian reservations initially were established, the United States held the lands of the Indian tribes in trust. In the 1880's, however, Congress adopted a policy of patenting land, that is, conveying parcels from federal ownership, by allotting the Tribes' common lands to individual members in severalty. See *County of Yakima v. Yakima Nation*, 502 U.S. 251, 254 (1992). The allotment policy was designed to encourage Indians to become

self-sufficient yeoman farmers and to open land to non-Indian settlers. *See id.*

Congress experimented extensively with allotment as early as 1854.² But it was not until 1887 that Congress universalized allotment under the General Allotment (Dawes) Act, ch. 119, 24 Stat. 388 (1887) (codified at 25 U.S.C. §§ 331-34, 339, 341-42, 348-49, 354, 381) ("Dawes Act").³ Under the Dawes Act, the United States could survey tribal lands and allot to "each head of a family," in severalty, up to 80 acres for farming and 160 acres for grazing. Dawes Act § 1, 24 Stat. at 388. The Secretary of the Interior was then authorized to negotiate for the "purchase and release by said tribe" of the large portions of the reservation remaining after allotment, with the proceeds of such residual land sales to be held in federal trust for the benefit of the Tribe. Dawes Act § 5, 24 Stat. at 389; *Hagen v. Utah*, 510 U.S. 399, 402 (1994). Consistent with its desire to facilitate westward expansion of the growing nation, Congress specified that all "lands adapted to agriculture" made available through this "purchase and release" process were to be used "for the sole purpose of securing homes to actual settlers." Dawes Act § 5, 24 Stat. at 389.

Congress further provided that land allotted under the Dawes Act was to be held by the United States in trust for the individual Indians for 25 years and then patented "in fee, discharged of said trust and free of all charge or

² *See* Treaty with the Confederated Ottoes and Missourias, Mar. 15, 1854, 10 Stat. 1038 (allotting lands in severalty and authorizing the sale of the residue for the Tribe's benefit); *see also* Felix S. Cohen's *Handbook of Indian Law* 98-102 (Bernard Strickland, ed. 1982) (hereinafter "Cohen").

³ Congress later extended the provisions of the Dawes Act to "all lands heretofore purchased or which may be purchased by authority of Congress for the use or benefit of any individual Indian or band or tribe of Indians." Act of Feb. 14, 1923, ch. 76, 42 Stat. 1246 (1923) (codified at 25 U.S.C. § 335).

incumbrance whatsoever." *Id.* Furthermore, Congress made the allotted land subject to state laws of "descent and partition" and gave the Indians on such lands "the benefit of and [made them] subject to the laws, both civil and criminal, of the State or Territory in which they may reside." *Id.* at § 6.⁴ Congress subsequently amended the Dawes Act by the Burke Act of 1906, ch. 2348, 34 Stat. 182 (1906) (codified at 25 U.S.C. § 349), which clarified that "state civil and criminal jurisdiction would lie . . . when the lands have been conveyed to the Indians by patents in fee." *County of Yakima*, 502 U.S. at 255.⁵ The Burke Act, however, expressly provided for state control and taxation of allotted lands for which the Secretary had issued fee patents before the trust period ended, known as "prematurely patented lands." *See County of Yakima*, 502 U.S. at 264.

B. The 1889 Nelson Act for the Chippewa in Minnesota

Responding in part to continuing pressure for expanded settlement, Congress sought to integrate Indians into non-

⁴ Congress later provided that all lands which had trust or other restrictions and were sold with the approval of the Secretary by the heirs of allottees are expressly "subject to taxation under the laws of the [situated] State or Territory." Act of May 27, 1902, ch. 888, § 7, 25 Stat. 245, 275 (codified at 25 U.S.C. § 379).

⁵ Congress passed the Burke Act in response to a decision of this Court, *In re Heff*, 197 U.S. 488, 503, 509 (1905), *overruled*, *United States v. Nice*, 241 U.S. 591, 601 (1916), which held that Indians received "emancipation from Federal control" immediately upon allotment. The Burke Act proviso specifically authorizes:

the Secretary of the Interior . . . in his discretion, . . . whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent

25 U.S.C. § 349 (emphasis added).

Indian society and to provide new land for settlement or commercial exploitation by non-Indians by enacting numerous tribe-specific surplus land allotment acts "to force Indians onto individual allotments carved out of reservations and to open up unallotted lands for non-Indian settlement." *Solem v. Bartlett*, 465 U.S. 463, 467 (1984).⁶ Often without explicit reference to the Dawes Act, these Acts provided for the sale of lands remaining after allotment and furthered Congress' goals of promoting assimilation of the Indians and ending the reservation system. *See* Cohen, at 132-38.⁷ The inevitable result of sales of individual parcels of reservation land to non-Indians was that "reservations became checkerboarded as the sale of surplus lands to whites isolated individual Indian allotments." *See id.* at 137.

⁶ *See, e.g.*, Fort Berthold Reservation Act, ch. 264, 36 Stat. 455 (1910); Rosebud Sioux Act, ch. 260, 36 Stat. 448 (1910); Pine Ridge Reservation Act, ch. 257, 36 Stat. 440 (1910); Flathead Reservation Amendment Act, ch. 156, 36 Stat. 296 (1910); Cheyenne River and Standing Rock Reservations Act, ch. 218, 35 Stat. 460 (1908); Rosebud Sioux Act, ch. 2536, 34 Stat. 1230 (1907); Oklahoma Osage Allotment Act, ch. 3572, 34 Stat. 539 (1906); Colville Reservation Act, ch. 1126, 34 Stat. 80 (1906); Wind River Reservation Act, ch. 1452, 33 Stat. 1016 (1905); Devil's Lake Reservation Act, ch. 1620, 33 Stat. 319 (1904); Flathead Reservation Act, ch. 1495, 33 Stat. 302 (1904); Rosebud Sioux Act, ch. 1484, 33 Stat. 254 (1904); Colville Reservation Act, ch. 140, 27 Stat. 62 (1892); Appropriations Act of March 3, 1891, ch. 543, 26 Stat. 989 (1891) (containing agreements with the Fort Berthold Indians, §§ 23-25; Sisseton and Wahpeton Sioux, §§ 26-30; and Montana Crow, §§ 31-34); Great Sioux Act, ch. 405, 25 Stat. 888 (1889). After *Lone Wolf v. Hitchcock*, 187 U.S. 553, 567-68 (1903), in which this Court held that involuntary statutory cession of Indian lands was within Congress' powers, tribal consent to surplus land acts was not required.

⁷ Given the variation in the language of these Acts and the circumstances surrounding their passage, some of these Acts have been interpreted as having diminished the reservation's boundaries, while others merely allowed for land sales to non-Indians within the existing reservation boundaries. *See Hagen*, 510 U.S. at 410.

On January 4, 1888, within months of the enactment of the Dawes Act, Representative Nelson of Minnesota introduced a bill providing for allotments to individual Chippewa and the sale of unallotted reservation lands to non-Indians for lumbering and farming. *See* IV William W. Folwell, *A History of Minnesota* 219-24 (1930).⁸ The Nelson Act, signed into law on January 14, 1889, ch. 24, 25 Stat. 642 (1889), contained four sections governing land disposition. Under section three, land was to be allotted to individual Indian households "in conformity with [the General Allotment or Dawes Act]." *Id.* at 3. The other three sections authorized sales of surplus, unallotted lands to non-Indians based on the Tribe's "complete cession and relinquishment in writing of all title and interest" in section 1. Under sections four and five, lands valued for standing pine timber—"Pine Lands"—were to be surveyed, advertised, and sold at public auction. *Id.* at §§ 4 & 5. Under section six, "agricultural lands" were to be sold "to actual settlers only under the provisions of the homestead law." *Id.* at § 6. The United States held the proceeds of these sales in trust for the benefit of the Chippewa with the interest paid to Indian families and used to support "a system of free schools," and the principal to be paid to tribal members in 50 years. *Id.* at § 7; *see also* IV Folwell, *History of Minnesota*, at 221-22.

C. The Indian Reorganization Act of 1934

Nearly 50 years after the Dawes Act, Congress enacted the Indian Reorganization (Wheeler-Howard) Act of 1934, ch. 576, 48 Stat. 984 (1934) ("Reorganization Act") (codified as amended at 25 U.S.C. §§ 461-479), which reversed direction and abandoned the policy of integrating Indians into non-Indian society. *See Mattz v. Arnett*, 412 U.S. 481, 497 n.18 (1973). The Reorganization Act

⁸ The Nelson Act was amended by an Act of June 27, 1902, ch. 1157, 32 Stat. 400 and an Act of June 25, 1910, ch. 431, § 27, 36 Stat. 855, 862, both of which related primarily to disposition of "Pine Lands" and later homesteading on those lands.

prohibited further allotments and extended indefinitely any existing restrictions on alienation of federal trust lands. Reorganization Act §§ 1-2. The Act further provided the United States with authority to restore the trust status of land within or contiguous to reservations. Reorganization Act § 5 (codified at 25 U.S.C. § 465).

The Reorganization Act did not, however, attempt to reverse the multitude of land transactions under the Dawes Act or any of the other allotment acts that had authorized the alienation of nearly two-thirds of former Indian lands. *See County of Yakima*, 502 U.S. at 255-56; Cohen, at 138. Indian reservations shrank by approximately 90 million acres from 1887 to 1934 due to sales by allottees to non-Indians, cession of land to the United States, and other sales to non-Indian settlers and businesses. *See* Cohen, at 138. The resulting checkerboard pattern of Indian and non-Indian ownership within reservations' former boundaries thus continues. Today, only 54.1% of the population of reservations are American Indians, Eskimos and Aleuts. *See* Bureau of Census, U.S. Dep't of Commerce, 1990 *Census of Population: General Population Characteristics: American Indian and Alaska Native Areas* 1, tbl. 1 (1992). For example, Osage County, Oklahoma, which borders Tulsa, is coextensive with the Osage Reservation, but Indians constitute only 14.8% of its population. *See id.* Similarly, the Uintah Indian Reservation analyzed in *Hagen v. Utah*, 510 U.S. 399 (1994), is 85% non-Indian and contains Roosevelt City, which is 93% non-Indian. *Id.* at 420-21.

D. Proceedings Below

This case involves twenty-one parcels within the reservation of the Leech Lake Band of Chippewa Indians in Cass County, Minnesota, thirteen of which were originally allotted to Indians, seven of which were sold as pine land, and one of which was sold as a homestead. *See* Pet. App. 33. Pursuant to the Nelson Act, each of these parcels was alien-

ated from federal trust status by allotment, fee patenting and subsequent sale, or by direct sale in fee to non-Indians. *See id.* During this period of non-Indian ownership, Cass County had authority to assess and collect non-discriminatory *ad valorem* taxes on each parcel.

The Leech Lake Band has recently repurchased in fee several parcels lying within the boundaries of its reservation. Utilizing the authority in section five of the Reorganization Act, the Band has placed some of its new purchases, including the site of its casino, into federal trust status, which clearly exempts those parcels from state taxation. *See* Pet. App. 24 n.14. But the Band has not obtained federal trust status for the parcels at issue in this case and holds all of them in fee simple. *See id.* After the County assessed *ad valorem* taxes on the Band's fee lands and the Band paid under protest to avoid foreclosure, the Band brought this action seeking a declaration that these parcels are immune from *ad valorem* taxes, an injunction against such taxes, and refund of the amounts paid. *See* Pet. App. 33-34.

The district court held that all of the parcels are taxable because Congress had alienated all of the parcels from Indian control and "alienation is the touchstone" for finding taxability under *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251 (1992). Pet. App. 37. The court of appeals agreed that the lands allotted to individual Indians under the terms of the Dawes Act are taxable under *County of Yakima*, but reversed the district court with respect to the parcels that Nelson Act §§ 4-6 designated for homesteading and pine harvesting. Pet. App. 22-23. The court of appeals held that Congress' action in ordering the public sale of these parcels was an insufficient manifestation of its intent to subject them to county taxing authority because sections four through six of the Nelson Act did not explicitly incorporate the Dawes Act or make any reference to state tax immunity. *Id.* The anomalous consequence of the court of appeals' decision is

that parcels originally allotted to individual Chippewa under the Nelson Act remain taxable, but the pine and homestead lands sold to non-Indians under the Nelson Act over a century ago have now become tax-exempt.

SUMMARY OF ARGUMENT

I. Indian tribes enjoy immunity from state and local taxation only as an extension of congressional power. See *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 173 (1989); *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764 (1985). Therefore, when Congress has expressed its intent to allow state or local taxation, Indian tribes have no independent basis for claiming exemption from state authority. A "categorical allowance of State taxation [exists] when it has in fact been authorized by Congress." *County of Yakima*, 502 U.S. 251, 267 (1992).

In *County of Yakima*, this Court reviewed the history and legacy of federal allotment policy and the Dawes Act and held that the Act expressly allowed a county to assess *ad valorem* taxes on land owned in fee by Indians within an Indian reservation. See *id.* at 266-67. Because Congress authorized such taxation, this Court held that neither a Tribe nor an individual Indian retained any inherent power to prevent the assessment of state taxes. See *id.* at 267.

Although this case concerns land conveyed to non-Indians under one of the surplus land statutes that followed the Dawes Act, the analysis here is no different—once Congress has chosen to extinguish its protection of the Indian land, Tribes lack any power unilaterally to rekindle federal supremacy. Thus, the relevant inquiry is whether Congress intended to alienate the land from federal protection and control and whether Congress made its intention to do so clear.

Pursuant to its policy of allotment and assimilation, Congress enacted numerous statutes that allotted tribal

lands in severalty to individual Indians and thereafter provided for the sale of unallotted lands directly to non-Indian settlers and businesses. This Court has already held that Congress intended to relinquish federal protection of allotted land after the end of trust restrictions, even if Indians still owned the land. See *County of Yakima*, 502 U.S. at 267-68; *Goudy v. Meath*, 203 U.S. 146, 149 (1906). Accordingly, the Federal Government's action in selling parcels publicly to non-Indian settlers and businesses must be convincing evidence of Congress' unmistakable intent to terminate all federal protection for the lands. Once such lands were alienated from federal control and protection, they became subject to state and local *ad valorem* taxation and remain subject to such taxation unless Congress reasserts federal status through the trust process, 25 U.S.C. § 465. Accordingly, the efforts of the Leech Lake Band unilaterally to reassert immunity from *ad valorem* taxation should be rejected.

Although Congress has now reversed its policies of allotment and assimilation, it has chosen not to disturb the multitude of land transactions that occurred as a result of those policies. See *County of Yakima*, 502 U.S. at 255-56. Instead, it has offered Tribes a specific statutory method, 25 U.S.C. § 465, for the re-establishment of federal trust status, but only after due consideration by the Federal Government of the fiscal and other impacts of renewed federal immunity on the affected States and local governments. See 25 C.F.R. § 151.10(e). Because the decision below sanctions the Leech Lake Band's circumvention of Congress' prescribed mechanism for re-establishing federal trust status over Indian lands, the judgment of the court of appeals should be reversed.

II. The rule that alienability equals taxability is consistent with this Court's long-standing objective of encouraging clarity in matters of Indian taxation and facilitates the fair and efficient assessment of *ad valorem* taxation. By expressly recognizing that Congress' alienation of land

from federal control in itself manifested an intent to render such land subject to state and local *ad valorem* taxation, this Court can obviate the need for repeated, complex, and protracted litigation over the tax status of Indian-owned parcels and preclude questionable land development practices.

ARGUMENT

I. WHERE CONGRESS HAS CHOSEN TO RELINQUISH FEDERAL CONTROL AND PROTECTION OF RESERVATION LAND THROUGH ALLOTMENT OR PUBLIC SALE, THE TRIBE'S REPURCHASE OF SUCH PARCELS IN FEE DOES NOT RE-ESTABLISH FEDERAL IMMUNITY FROM STATE AND LOCAL *AD VALOREM* TAXATION

At least since *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1972), this Court has avoided "platonic notions of Indian sovereignty" and instead determined the limits of state power by reference to the applicable federal treaties and statutes. *See id.* at 172. As the various allotment and surplus land acts make plain, Congress decided long ago to end exclusive Indian sovereignty over most tribal lands by allotment or public sale. Although Congress later abandoned the policy of assimilation through allotment, Congress has not given the Tribes the power that the Leech Lake Band asserts—the power to extend federal supremacy over a State's lands by the Tribe's mere repurchase of a parcel in fee from private parties.

A. Federal Supremacy Is the Sole Source of Any Indian Immunity From State and Local Taxation

Absent express congressional authorization, the United States is immune from state and local taxation. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 430-32 (1819). The United States shares this immunity with "the Indian tribes for whose benefit the United States holds reservation lands in trust." *Cotton Petroleum Corp.*, 490 U.S. at 175

(citing *Blackfeet Tribe*, 471 U.S. at 764). "Absent explicit congressional direction to the contrary," States thus presumptively lack jurisdiction to tax Indian property on an Indian reservation because of federal supremacy. *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 128 (1993); *see also Bryan v. Itasca County*, 426 U.S. 373, 376 n.2 (1976); *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 171 (1973); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973).

Given the significance of the power to tax, this Court has declined to find such congressional authorization of state taxation except where Congress has "made its intention to do so unmistakably clear." *County of Yakima v. Yakima Indian Nation*, 502 U.S. at 258; *Blackfeet Tribe*, 471 U.S. at 765. State and local taxation of Indians and Indian tribes is thus categorically allowed "when it has in fact been authorized by Congress." *County of Yakima*, 502 U.S. at 267 (rejecting application of the test established in *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1980), which balanced state and tribal interests in determining tribal zoning powers over non-Indians within a reservation).⁹

B. Indian Lands That Were Allotted or Sold Pursuant to the Dawes Act or Other Congressional Action Are Taxable Because Congress Made Them Alienable

1. This Court has already held in *County of Yakima*, *supra*, and *Goudy v. Meath*, 203 U.S. 146 (1906), that the General Allotment (Dawes) Act made land which was allotted and patented to Indians freely alienable after the

⁹ *See also Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 177 (1980) (Rehnquist, J., concurring in part and dissenting in part) ("Either Congress intended to preempt the state taxing authorities or it did not. Balancing of interests is not the appropriate gauge for determining validity since it is that very balancing which we have reserved to Congress.").

expiration of federal trust restrictions and, therefore, unmistakably allowed States to impose *ad valorem* taxes on fee land even if it is within a reservation and held by Indians or their Tribe. See *County of Yakima*, 502 U.S. at 263-64; *Goudy*, 203 U.S. at 149. "When § 5 [of the Dawes Act] rendered the allotted lands alienable and encumberable, it also rendered them subject to assessment and forced sale for taxes." *County of Yakima*, 502 U.S. at 263-64.¹⁰ The Court confirmed this reading with the Burke Act proviso, which applies literally only to land for which the Secretary issued patents before the normal expiration of the trust period ("prematurely patented lands"), and which amended § 6 of the Dawes Act by "specifically mentioning immunity from land taxation as one of the restrictions that would be removed upon conveyance in fee" of the Indian lands. *Id.* at 259. As this Court observed in *Goudy*, only by "disregarding the act of Congress" could the Court hold that "the Indian, having property, is not subject to taxation when he is subject to all the laws, civil and criminal, of the State." 203 U.S. at 150. It would be unreasonable, this Court concluded, to impute to Congress an intention to "permit the Indian to dispose of his lands as he pleases, while at the same time releasing it from taxation." *Id.* at 149.

¹⁰ This conclusion comports with this Court's traditional understanding that the Nonintercourse Act, 25 U.S.C. § 177, stands for the rule that "the extinguishment of Indian title required the consent of the United States." *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 678 (1973); see also *Larkin v. Paugh*, 276 U.S. 431, 433-34 (1928) (finding no incidental restrictions against alienation once the United States issues a patent). Apparently, the Band intends to assert that the Nonintercourse Act operates to restrict its ability to sell its repurchased fee parcels, rendering them not freely alienable. See Respondent's Br. in Opposition at 8-9. This position is untenable, however, because this Court in *County of Yakima* expressly found similar plots to be "alienable and encumberable" based on Congress' clear intent to make them so. *County of Yakima*, 502 U.S. at 263.

Contrary to the opinion of the court of appeals, this Court in *County of Yakima* did not hold that *only* the Burke proviso "provide[d] [the] unmistakably clear congressional intent to allow state taxation." Pet. App. 17. Rather, the Court considered the Burke proviso, which applies only to prematurely patented lands, to be "nothing more than an acknowledgment (and clarification) of the operation of § 5 with respect to all fee patented land." *County of Yakima*, 502 U.S. at 264 n.4. Accordingly, the Court found it "inconsequential" that the record did not reflect whether the parcels at issue became alienable "pursuant to the proviso." *Id.* If the court of appeals' reading were correct, then the factor which this Court considered "inconsequential"—whether the land became alienable directly under the Burke proviso—would have been necessary to decide whether each parcel was taxable.

The court of appeals, however, undertook the very type of narrow reading that *County of Yakima* rejected when the court parsed each section of the Nelson Act as if each were a separate statute, searching for explicit references to taxability. Finding no references to state taxation in the pine land or homestead provisions of the Nelson Act—which provided for the sale of land in fee to the general public—the court of appeals concluded that these very same parcels suddenly reassumed tax-exempt status when repurchased by the Band. See Pet. App. 22-23. But in so holding, the court ignored the fact that Congress did not include a provision expressly subjecting land purchased under the pine or homestead provisions of the Nelson Act to state tax authority because there was no need to do so—it would have been absurd to assume that a non-Indian settler or commercial interest who purchased the land on the open market could have continued to enjoy the land's former tax-exempt status.

2. Lands that Congress made alienable should be taxable irrespective of the method—allotment to individual Indians or sale to non-Indians—Congress used to remove

the land from federal protection. The land in question is not "land set aside for [tribal] members." *Sac and Fox Nation*, 508 U.S. at 124. Rather, it is land Congress once chose to accord federal trust status and later chose to remove from that status. Congress' policy of ending federal trust status and eliminating Indian sovereignty unmistakably demonstrates its intention that state and local governments should be able to tax these lands. Once Congress chose to end the reservation status of property and sell it on the open market, the previous federal use of and interest in the land was extinguished. *See Hagen*, 510 U.S. at 412-13. As this Court has repeatedly observed, "treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands." *South Dakota v. Bourland*, 508 U.S. 679, 697 (1993); *Blackfeet Tribe*, 450 U.S. at 561; *see also Brendale*, 492 U.S. at 436-37 (Stevens, J.). And the effect of congressionally-authorized alienation of tribal lands is the termination of pre-existing attributes of tribal sovereignty and the creation of state taxing authority. *See Bourland*, 508 U.S. at 697; *Blackfeet Tribe*, 450 U.S. at 560 n.9.

Only the kind of "technical and narrow" statutory construction that this Court rejected in *Goudy*, 203 U.S. at 150, could lead to the conclusion that the subtle variations in the numerous surplus land acts are relevant to the current tax status of a parcel that has been bought and sold in the open market for a century. Such an approach leads to ahistorical and anomalous results. The Nelson Act is one of many Acts of Congress that provided for specific land allotments and authorized sales of surplus lands.¹¹ The intent of Congress in all of the Acts was to eliminate the reservation system and open these lands to non-Indian settlers by making these lands freely alienable. *See Montana v. United States*, 450 U.S. 544, 559 n.9 (1981) (collecting statements of multiple legislative and executive officials to the effect that allotment was intended

to "eliminate tribal relations"); *Cohen*, at 128-29. The "Members of Congress voting on the surplus land Acts believed to a man that within a short time—within a generation at most—the Indian tribes would enter traditional American society and the reservation system would cease to exist." *Solem*, 465 U.S. at 468.

It is at the very least revisionism to impute to Congress an intention that lands that it purposely sold into non-Indian ownership could regain federal tax immunity without its consent. Although ambiguous expressions in statutes are to be construed liberally in favor of the Indians, *see County of Yakima*, 502 U.S. at 269, canons of construction do not permit a reading that amounts to a disregard for such a clearly and repeatedly expressed congressional intention. *See Negonsott v. Samuels*, 507 U.S. 99, 110 (1993); *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986); *see also Rice v. Rehner*, 463 U.S. 713, 732 (1983) (refusing to apply an Indian law canon of construction "when application would be tantamount to a formalistic disregard of congressional intent").

The holding below provides a compelling example of the anomalous results such an ahistorical approach allows. Under the court of appeals' strained reading, lands that the Nelson Act disposed of as pine or homestead lands by sale to the public are deemed tax-exempt, while lands allotted by reference to the Dawes Act's federal trust restrictions and which could only indirectly enter the open market are deemed taxable. *See Pet. App.* 22-23. Given the holding of *County of Yakima* that unrestricted fee land within a reservation held in an unbroken chain of Indian ownership since the original Indian allottee is taxable, *see* 502 U.S. at 266-67, it is exceedingly odd to suppose that Congress would have intended immunity from *ad valorem* taxation when a Tribe reacquired fee land from a non-Indian. It strains credulity to argue that Congress intended for Indian purchasers of land from private

¹¹ *See* note 6 *supra*, listing a small sample of these Acts.

owners to enjoy federal immunities that arose from the land's long-past trust status.

In effect, the Band argues that its tax immunity laid dormant during non-Indian ownership, but then sprang forth when the Band purchased the land. Only the fact that the purchasers were Indians makes this claim even colorable. But Indians enjoy immunity from state and local *ad valorem* taxation only derivatively from federal tax immunity. Accordingly, in order to justify its claim in this case, the Band must show a grant of congressional power that allows it to remove land from the tax base and make it part of the area over which it exercises attributes of exclusive sovereignty simply by purchasing it in fee from a private non-Indian party. This showing cannot be made.

3. The power to tax is "basic to the power of the State to exist." *Arkansas v. Farm Credit Servs.*, 117 S. Ct. 1776, 1780 (1997); *see also Board of County Comm'rs v. United States*, 308 U.S. 343, 351 (1939) (urging "due regard for local institutions and local interests" in an Indian challenge to county taxation). The taxes at issue here—non-discriminatory *ad valorem* assessments—comprise a significant portion of most local government budgets, and Indian tribes cannot be said to possess an unfettered "super-sovereign authority" to extend federal tax immunity to land that they merely purchased on the open market. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 466 (1995) (holding that Indian tribes lack any "super-sovereign authority to interfere with another jurisdiction's sovereign right to tax income"). Any such rule would inflict serious harm on *amici's* members.

The Leech Lake Band's assertion of a tribal power to expand its tax-exempt lands, *sua sponte*, by the mere purchase of land from private parties labors hard against the great weight of this Court's Indian law decisions. In case after case, this Court has recognized that the substantial

dilution of Indian populations on reservation lands has created the need for "States and tribes [to] have concurrent jurisdiction over the same territory." *Cotton Petroleum Corp.*, 490 U.S. at 192; *see also Solem*, 465 U.S. at 467 ("[F]ederal, State and tribal authorities share jurisdiction" over unallotted lands even "if the relevant surplus land Act did not diminish an existing Indian reservation.").¹² Thus, while affirming that "Indian tribes retain inherent sovereign powers to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands," the Court has limited the jurisdiction that Tribes can assert even within their own reservations.¹³ *Strate v. A-1 Contractors*, 117 S. Ct. 1404, 1409 (1997) (quoting *Montana v. United States*, 450 U.S. at 565). Accordingly, in *South Dakota v. Bourland*, 508 U.S. 679 (1993), this Court held that a Tribe could not regulate hunting and fishing by non-Indians within its reservation because the Tribe had lost "regulatory jurisdiction over the use of land by others" when it "convey[ed] ownership of its tribal lands to non-Indians." *Id.* at 689.

Tribes of course retain rights to protect their "political integrity, economic security, [and] health and welfare."

¹² Indeed, Congress gave Minnesota "jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in . . . [a]ll Indian country within the State, except the Red Lake Reservation." Act of Aug. 15, 1953 (Public Law 280), ch. 505, § 4, 67 Stat. 589 (1953) (codified at 28 U.S.C. § 1360(a)). The Act gave similar jurisdiction to five other States and created a mechanism for additional States to acquire such jurisdiction. *See id.* Congress, however, substantially modified the Act through Title IV of the Civil Rights Act of 1968, Pub. L. No. 90-284, § 301, 82 Stat. 73, 78 (1968) (codified at 25 U.S.C. §§ 1321-26). *See Bryan v. Itasca County*, 426 U.S. 373, 386-87 (1976).

¹³ The fact that the reservation lands in question are part of "Indian Country," 18 U.S.C. § 1151, does not affect the analysis. Indian Country includes "all land within the limits of any Indian reservation" including the lands of non-Indians. Yet in *County of Yakima*, this Court concluded that land plainly part of Indian Country was subject to *ad valorem* taxation. *See* 502 U.S. at 256.

Strate, 117 S. Ct. at 1409. But as this Court observed in *County of Yakima*, it would be a "great exaggeration" to suggest that "the mere power to assess and collect a tax on certain real estate" imperils a Tribe's political integrity, economic security, or health and welfare. *County of Yakima*, 502 U.S. at 265. Indeed, the *in rem* nature of *ad valorem* taxation guarantees that it burdens only property in which the federal interest has been eliminated, as opposed to affecting Indians *in personam*. See *id.* at 266 (noting that because *ad valorem* taxation "flows exclusively from the ownership of realty," it can create only "a burden on the property alone").

Moreover, this Court has expressly recognized the interests of state and local governments in implementing neutral systems of regulation and taxation within the borders of Indian reservations. For example, in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), the Court upheld the imposition of state sales taxes on purchases made by non-Indians on reservation lands. *Id.* at 161.¹⁴ Similarly, this Court has rejected any notion of an impermeable, land-based tribal sovereignty by upholding state collection of excise taxes within reservations, see *California State Board of Equalization v. Chemeheuvi Indian Tribe*, 474 U.S. 9, 12 (1985); exclusive state power to zone in the largely non-Indian areas of reservations, see *Brendale*, 492 U.S. at 427 (White, J.); 492 U.S. at 434-45 (Stevens, J.), and, most recently, *ad valorem* taxation of allotted Indian-owned lands within a reservation, see *County of Yakima*, 502 U.S. at 265-66.¹⁵ Absent from these cases is any sug-

¹⁴ See also *Department of Taxation & Finance v. Mülhelm Attea & Bros.*, 512 U.S. 61, 73 (1994) (reaffirming tribal obligation to collect state sales taxes levied on sales to non-Indians within reservation boundaries); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 512 (1991) (same).

¹⁵ See also *Duro v. Reina*, 495 U.S. 676, 693 (1990) (holding that Tribes do not have inherent criminal jurisdiction over Indians who

gestion that Tribes, acting without congressional authority, have an inherent power to trump *ad valorem* taxation of land within Indian Country solely by reacquiring it in fee.

C. Tribes Should Not Be Permitted to Circumvent Congress' Statutory Mechanism for Restoring Taxable Lands to Federal Trust Status

1. The court of appeals' holding has the practical effect of nullifying the carefully crafted procedure that Congress has provided for re-establishing federal trust status over lands acquired by an Indian tribe. In Section 5 of the Reorganization Act, codified at 25 U.S.C. § 465, Congress granted the Secretary of the Interior authority to accept (or to purchase) land to be held in trust by the United States for the benefit of Indians. Under this provision, other reacquired land including the site of the Leech Lake Band's casino, have been restored to the status of tribal trust lands. See Pet. App. 24 n.14. This Court should not allow Tribes to evade this explicit mechanism and its protections for state and local governments.

Congress' scheme represents a careful legislative balance of the interests involved in placing lands into federal trust, which exempts them "from State and local taxation," 25 U.S.C. § 465. Under the regulations that implement Section 5, 25 C.F.R. Part 151, state and local governments are expressly entitled to comment on a federal proposal to place lands in trust. See 25 C.F.R. § 151.10.

are not members of their tribe), superseded by Act of Oct. 28, 1991, Pub. L. No. 102-137, 1991 U.S.C.C.A.N. (105 Stat.) 646; *Montana v. United States*, 450 U.S. at 566-67 (forbidding tribal regulation of hunting and fishing by non-Indians on fee lands located within a reservation); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) (holding that Tribes lack criminal jurisdiction over non-Indians for offenses committed within reservations); cf. 25 U.S.C. § 357 (allowing States the power to condemn any allotted land, even if federal restrictions remain, "for any public purpose"); 25 U.S.C. § 348 (applying state laws of partition and descent to allotments).

Most significantly, these regulations recognize that all lands in unrestricted fee status are normally subject to *ad valorem* taxation and therefore mandate that the Secretary consider "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls." 25 C.F.R. § 151.10(e). These procedures also require that the Secretary give 30 days' notice before accepting title to allow for judicial review under the Administrative Procedure Act. See *United States Dep't of the Interior v. South Dakota*, 117 S. Ct. 286, 287 (1996) (Scalia, J., dissenting from GVR) ("judicial review of [a Reorganization Act] land trust acquisition may be obtained by filing suit within the 30-day waiting period").

2. The court of appeals' holding allows the Band to circumvent Congress' prescribed mechanism for establishing federal trust status over lands in unrestricted fee status. In effect, the court grants Tribes a necessarily federal power unilaterally to remove land from state and local tax rolls without providing state and local governments any procedural or substantive protections.

Granting Tribes the ability to obtain tax exemptions without federal procedural safeguards is especially harmful to local governments because it destroys the Tribes' incentive under § 465 to negotiate with affected communities in order to obtain their support for applications for federal trust status. In practice, such negotiations can be central to the economic health of smaller communities located near Indian reservations.¹⁶ For example, based on negotiations with local officials, the Oneida Indians agreed to give \$320,000 in lieu of taxes to a local school district and municipalities near their hotel and casino complex (with plans for a golf course and convention center). See

¹⁶ Such negotiations are also important to western cities as large as Tulsa, which has a sizable Osage Reservation in its suburbs. Indeed, Indians are currently seeking trust status for 7,724 acres in about half of Oklahoma's counties. See Jim Myers, [U.S. Rep.] *Istook Says Land Move Threatens Schools*, Tulsa World, May 30, 1997, at A11.

James Dao, *Gambling in the Middle of Nowhere*, N.Y. Times, Nov. 10, 1997, at B1.¹⁷ Similarly, in order to win the support of a neighboring town council for its application for federal trust status, the Narragansett Indians agreed to use a 31-acre fee site only for housing and to pay \$25,000 in back taxes. See Sara Olkon, *Town Council Backs Tribe's Application for Trust Status*, Providence Journal-Bulletin, Aug. 25, 1997, at 1C.

This Court should not give to the Leech Lake Band and other Tribes a trump card in negotiations with state and local governments that Congress and the Secretary have denied them. *Amici* respectfully submit that the need to preserve the integrity of the existing scheme to restore taxable land to trust status under Section 5 of the Reorganization Act is further reason to reverse the judgment of the court of appeals.

II. EXEMPTION FROM *AD VALOREM* TAXES FOR LANDS THAT TRIBES HOLD IN FEE WOULD IMPAIR STATE AND LOCAL GOVERNMENT ADMINISTRATIVE AND ECONOMIC INTERESTS

1. This Court has "traditionally followed 'a per se rule' 'in the special area of State taxation of Indian tribes and tribal members'" that recognizes the administrative needs of state and local governments. *County of Yakima*, 502 U.S. at 267-68 (quoting *California v. Cabazon Band of Indians*, 480 U.S. 202, 215 n.17 (1987)). This con-

¹⁷ These negotiations were under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, which is not directly implicated in this case but gives rise to similar negotiations over tax and regulatory issues. For example, the Mohegan Indians took a 240-acre site off the tax rolls for their casino but gave the town of Montville, Connecticut, \$500,000 per year for capital improvements and \$3 million for an extension of the town water line in exchange. See Lyn Bixby, *Mohegan Sunrise*, Hartford Courant, Oct. 11, 1997, at A1. Similarly, the Eastern Shawnee Tribe of Oklahoma is negotiating to put a casino on trust lands in Southwest Missouri near family-oriented tourist attractions. See Sen. Christopher Bond, *Gambling in Missouri*, Congressional Press Release, May 20, 1997.

cern for tax administration supports an "alienability equals taxability" rule. In light of the considerable administrative burdens that would result from the approach of the court of appeals, this Court should adopt a categorical rule that States may assess non-discriminatory *ad valorem* taxes on former Indian lands within reservation boundaries that have been sold in fee under Congress' direction, regardless of the identity of the lands' current owners.¹⁸

State and local governments have an obvious and compelling interest in the certainty, lower administrative costs, and reduced litigation that result from *per se* rules in Indian tax matters. Practical considerations require that the tax status of a parcel be readily and clearly determined lest litigation "engulf the States' annual assessment and taxation process, with the validity of each levy dependent upon a multiplicity of factors that vary from year to year, and from parcel to parcel." *County of Yakima*, 502 U.S. at 267. In addition, in this era of growing local responsibilities, state and local governments require more stability in their tax bases to allow for fiscal planning. *Amici* urge this Court to obviate the need for repeated, complex, and protracted litigation over the tax status of particular parcels of land by articulating a clear, bright-line rule for the *ad valorem* taxation of parcels owned in fee by Indians or Indian tribes within Indian Country.

2. Under a rule of "alienability equals taxability," state and local governments would be able to assess non-discriminatory *ad valorem* taxes on all land not held in federal trust or restricted status. Consistent with universal practices, the burden of demonstrating exemption would be on the property owner who has superior knowledge of the parcel's history. See, e.g., *White Earth Land Recovery Project v. County of Becker*, 544 N.W.2d 778, 780

¹⁸ All non-discriminatory tax exemptions, such as those for religious, educational, and other not-for-profit organizations, are of course available to Indian tribes.

(Minn. 1996) ("All property is presumed taxable, and the burden is on the party seeking tax-free status to prove entitlement to the claimed exemption."). While some amount of parcel-by-parcel assessment of property is of course inevitable given the nature of *ad valorem* taxation and the checkerboard pattern of reservation lands, the rule that alienability equals taxability has the advantage of requiring a single, lasting determination of the tax status of each parcel. Repeated reference to the nuances of specific treaty and statutory provisions would thus not be necessary every time fee land within a reservation changed hands.¹⁹

3. The court of appeals' decision results in an unduly complicated system of *ad valorem* taxation that requires state and local governments to undertake a parcel-by-parcel examination of the subtleties of specific treaty provisions and then continually to reassess the tax status of individual parcels based on the identity of the current owners. *Amici* have a strong interest in this Court's formulation of clear, easily administered rules which decrease collection costs, reduce tax disputes, and facilitate proper assessment of local tax bases. This Court should not sanction a rule that forces the repeated examination of the nuances of century-old treaty provisions and statutes that is currently required to assess *ad valorem* taxation in the Sixth and Eighth Circuits. *Amici* urge this Court to give due consideration to their interest in avoiding the high costs of tax assessment and the complex and protracted litigation endemic to a rule that turns tax administrators into legal historians.

¹⁹ As the Department of the Interior assumed in its regulations under § 5 of the Reorganization Act, 25 C.F.R. § 151.10(e) (considering land held in "unrestricted fee status" to be on "the tax rolls"), several States have already developed a practice of subjecting lands within the boundaries of Indian reservations to *ad valorem* taxes unless such lands are held in federal trust status or have other federal restrictions on alienation. See, e.g., 1996 Idaho Op. Atty. Gen. 24; 1993 Minn. Op. Atty. Gen. 414A-5.

4. In light of the fact that nearly half of the residents on reservations are not Indians, *see* Bureau of Census, *1990 Census of Population*, at 1, tbl. 1, *amici* fear the proliferation of aggressive land development practices if this Court affirms the court of appeals' decision. Giving Tribes unilateral power to exempt prime real estate from *ad valorem* taxes erodes the tax base even though the need for governmental services remains constant.²⁰ Illustrations of the problem abound. At the edge of Shakopee, Minnesota, Shakopee Indians with a tribal income in excess of \$600,000 per capita plan to build a shopping center that would result in lost local tax revenues estimated to exceed \$97.5 million over 12 years. *See* Mike Kaszuba, *Tensions Rise Over Tribe's Land in Shakopee*, Minneapolis Star Tribune, Nov. 9, 1997, at 1A. Similarly, three small Connecticut towns have had to join together to oppose the Mashantucket Pequots' use of casino profits to buy 5,000 acres of land, an action that could decimate the towns' tax rolls. *See* Jonathan Rabinovitz, *Towns Near Pequot Casino Object to Annexation Plan*, New York Times, Nov. 25, 1997, at B5; Jeff Nesbit, *Indian Tribes Can't Lose Bets on Casinos*, Washington Times, June 28, 1996, at B7. Finally, in a striking example of how the system can be manipulated, non-Indians have entered into 99 year leases with the Cochiti Pueblo Indians for Cochiti Lake properties and are fighting New Mexico's efforts to assess *ad valorem* taxes on their leases. *See* Andrew Padilla, *Cochiti Residents Fight Tax*, Albuquerque Journal, Nov. 6, 1997, at 4. This Court's approval of the

²⁰ Such tax status would also provide tribal businesses with a structural advantage over nearby non-Indian competitors and thereby decrease the value of taxable business. For example, a Tribe could purchase fee land near an interstate exit, declare it sovereign territory, and offer gasoline or other products at a significant discount to its non-Indian competitors. *See, e.g.*, Larry Richardson, *Oneidas Purchase New Plot: Site at Thruway Exit 34 May Be Used for a Casino and Truck Stop*, Syracuse Herald Journal, Mar. 1, 1997.

Band's position would undoubtedly fuel a burgeoning of aggressive Indian purchases of fee lands (and perhaps even purchases with immediate long-term lease-backs) in valuable sections of municipalities that were once part of reservations, such as resort locations near Taos, New Mexico, with the resulting steady erosion of local tax bases and the essential services they support.

* * * *

As even one of the courts of appeals that ruled in favor of the Indians' position noted:

It is not very satisfying as a policy matter to treat lands that were initially conveyed over 100 years ago differently for tax purposes depending on whether they were conveyed under the General Allotment Act or some other treaty.

United States ex rel. Saginaw Chippewa Indian Tribe v. Michigan, 106 F.3d 130, 134 (6th Cir.), *petition for cert. filed*, 66 U.S.L.W. 3085 (U.S. June 30, 1997) (No. 97-14). As that court correctly noted, the wisdom of policy matters is, of course, for Congress to determine. *See id.* But when Congress acts for more than 50 years through a multitude of allotments and surplus land acts with the clear purpose of eliminating the federal interest in the land, this Court should carry that intention into effect and recognize, as it did in *County of Yakima*, that the Congress that authorized the public sale of parcels to non-Indian settlers and businesses unmistakably intended to make those lands subject to state and local *ad valorem* taxation.

CONCLUSION

The judgment of the court of appeals as it relates to pine lands and homestead lands should be reversed.

Respectfully submitted,

CARTER G. PHILLIPS
JACQUELINE GERSON COOPER
EDWARD R. McNICHOLAS
SIDLEY & AUSTIN
1722 Eye St., N.W.
Washington, D.C. 20006
(202) 736-8000

December 15, 1997

RICHARD RUDA *
Chief Counsel
STATE AND LOCAL LEGAL
CENTER
444 N. Capitol St., N.W.
Washington, D.C. 20001
(202) 434-4850
* Counsel of Record for the
Amici Curiae

APPENDIX

12
No. 97-174

Supreme Court, U.S.

FILED

DEC 15 1997

CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1997

CASS COUNTY, *et al.*

v.

Petitioners,

LEECH LAKE BAND OF CHIPPEWA INDIANS,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

APPENDIX TO
BRIEF FOR LEWIS COUNTY, IDAHO;
AITKIN COUNTY, BENTON COUNTY,
CROW WING COUNTY, ISANTI COUNTY,
KANABEC COUNTY, MAHNOMEN COUNTY,
MILLE LACS COUNTY, MORRISON COUNTY,
PINE COUNTY, AND SHERBURNE COUNTY,
MINNESOTA; GLACIER COUNTY, LAKE COUNTY,
AND ROOSEVELT COUNTY, MONTANA;
LYMAN COUNTY, SOUTH DAKOTA;
DUCHESNE COUNTY AND UINTAH COUNTY, UTAH;
AMICI CURIAE, IN SUPPORT OF PETITIONERS,
CASS COUNTY, MINNESOTA, *ET AL.*

JAMES M. JOHNSON
Attorney at Law
1110 S. Capitol Way
Olympia, WA 98501
(360) 357-3104

TOM D. TOBIN *
TOBIN LAW OFFICES, P.C.
422 Main Street
P.O. Box 730
Winner, SD 57580
(605) 842-2500

* *Counsel of Record*

[Additional Counsel Listed on Inside Cover]

KIMRON TORGERSON
Lewis County Prosecuting
Attorney
P.O. Box 398
Nezperce, ID 83543
(208) 937-2271

BRADLEY C. RHODES
Aitkin County Attorney
209 Second Street, N.W.
Aitkin, MN 56431
(218) 927-7347

MICHAEL JESSE
Benton County Attorney
531 Dewey Street
Box 129
Foley, MN 56329
(320) 968-6254

DONALD F. RYAN
Crow Wing County Attorney
326 Laurel St., Courthouse
Brainerd, MN 56401
(218) 828-3952

JEFFREY EDBLAD
Isanti County Attorney
555 18th Avenue, S.W.
Cambridge, MN 55008
(612) 689-2253

NORMAN LOREN
Kanabec County Attorney
18 Vine Street North—
Courthouse
Mora, MN 55051-1351
(320) 679-2870

ERIC BOE
Mahnomen County Attorney
P.O. Box 439
Mahnomen, MN 56557
(218) 935-2378

JENNIFER FAHEY
Mille Lacs County Attorney
635 Second Street, S.E.
Milaca, MN 56353
(320) 983-8305

CONRAD FREEBERG
Morrison County Attorney
Morrison County Government
Center
213 1st Avenue SE
Little Falls, MN 56345
(320) 632-0190

JOHN CARLSON
Pine County Attorney
315 Sixth Street—Courthouse
Pine City, MN 55063
(320) 629-6781

WALTER KAMINSKY
Sherburne County Attorney
13880 Highway 10
P.O. Box 318
Elk River, MN 55330-1692
(612) 241-2565

LARRY EPSTEIN
Glacier County Attorney
512 East Main Street
Cut Bank, MT 59427-3016
(406) 873-2277

DEBORAH KIM CHRISTOPHER
Lake County Attorney
Lake County Courthouse
106 4th Ave. E
Polson, MT 59860-2125
(406) 883-7245

JAMES R. PATCH
Roosevelt County Attorney
400 Second Avenue South
Wolf Point, MT 59201-1600
(406) 653-2653

DALLAS E. BROST
Lyman County States Attorney
P.O. Box 38
100 South Main
Kennebec, SD 57544
(605) 869-2294

HERBERT WM. GILLESPIE
Duchesne County Attorney
500 East 100 South
P.O. Box 206
Duchesne, UT 84021
(801) 738-2435

JOANN B. STRINGHAM
Uintah County Attorney
152 East 100 North
Vernal, UT 84078
(801) 781-5436

APPENDIX

HOUSE OF REPRESENTATIVES

51ST CONGRESS, 1st Session.

Ex. Doc. No. 247

CHIPPEWA INDIANS IN MINNESOTA

MESSAGE

From The

PRESIDENT OF THE UNITED STATES,

Transmitting

*A communication from the Secretary of the Interior
relative to the Chippewa Indians in the State of Minnesota.*

March 6, 1890.—Referred to the Committee on
Indian Affairs.

To the Senate and House of Representatives:

In pursuance of the authority and direction contained in the act of Congress approved January 14, 1889, entitled "An act for the relief and civilization of the Chippewa Indians in the State of Minnesota," three commissioners were appointed by the President on February 26, 1889, as therein authorized and directed, namely: Henry M. Rice, of Minnesota, Martin Marty, of Dakota, and Joseph B. Whiting, of Wisconsin, to negotiate with said Indians.

The commissioners have submitted their final report, with accompanying papers, showing the results of the

negotiations conducted by them, and the same has been carefully reviewed by the Secretary of the Interior in his report to me thereon.

Being satisfied from an examination of the papers submitted that the cession and relinquishment by said Chippewa Indians of their title and interest in the lands specified and described in the agreement with the different bands or tribes of Chippewa Indians in the State of Minnesota was obtained in the manner prescribed in the first section of said act, and that more than the requisite number have signed said agreement, I have, as provided by said act, approved the said instruments in writing constituting the agreement entered into by the commissioners with said Indians.

The commissioners did not escape the embarrassment which unfortunately too often attends our negotiations with the Indians, viz: An indisposition to treat with the Government for further concessions while its obligations incurred under former agreements are unkept. I am sure it will be the disposition of Congress to consider promptly, and in a just and friendly spirit, the claims presented by these Indians through our commissioners, which have been formulated in the draught of a bill prepared by the Secretary of the Interior and submitted herewith.

The act of January 14, 1889 (25 U. S. Stat., 612) evidently contemplated the voluntary removal of the body of all these bands of Indians to the White Earth and Red Lake Reservations; but a proviso in section 3 of the act authorized any Indian to take his allotment upon the reservation where he now resides. The commissioners report that quite a general desire was expressed by the Indians to avail themselves of this option. The result of this is that the ceded land can not be ascertained and brought to sale under the act until all of the allotments are made.

I recommend that the necessary appropriations to complete the surveys and allotments be made at once avail-

able, so that the work may be begun and completed at the earliest possible day.

A copy of the report made by the commissioners, with copies of all of the papers submitted therewith except the census rolls, is herewith presented for the information of the Congress.

BENJ. HARRISON.

EXECUTIVE MANSION,
March 4, 1890.

DEPARTMENT OF THE INTERIOR,
Washington, January 30, 1890.

The PRESIDENT:

There has been filed in this Department the report of the Chippewa Commission, one copy whereof is herewith transmitted for your consideration and action.

This Commission was formed under an act entitled "An act for the relief and civilization of the Chippewa Indians in the State of Minnesota," being chapter 24, United States Statutes at Large, volume 25, page 642, approved January 14, 1889.

The first section of the act authorizes the creation of the Commission, designates its purposes, provides for certain conditions precedent as to a census to be taken, and declares in what manner the cession and relinquishment of the lands therein sought to be obtained by the Government shall be effected. The section is as follows:

That the President of the United States is hereby authorized and directed, within sixty days after the passage of this act, to designate and appoint three commissioners, one of whom shall be a citizen of Minnesota, whose duty it shall be, as soon as practicable after their appointment, to negotiate with all the different bands or tribes of Chippewa Indians in the State of Minnesota for the complete cession and relinquishment in writing of all

their title and interest in and to all the Reservations of said Indians in the State of Minnesota, except the White Earth and Red Lake Reservations, and to all and so much of those two reservations as in the judgment of said commission is not required to make and fill the allotments required by this and existing acts, and shall not have been reserved by the commissioners for said purposes, for the purposes and upon the terms hereinafter stated; and such cession and relinquishment shall be deemed sufficient as to each of said several reservations, except as to the Red Lake Reservation, if made and assented to in writing by two-thirds of the male adults over eighteen years of age of the band or tribe of Indians occupying and belonging to such reservations; and as to the Red Lake Reservation the cession and relinquishment shall be deemed sufficient if made and assented to in like manner by two-thirds of the male adults of all the Chippewa Indians in Minnesota; and provided that all agreements therefor shall be approved by the President of the United States before taking effect: *Provided further*, That in any case where an allotment in severalty has heretofore been made to any Indian of land upon any of said reservations, he shall not be deprived thereof or disturbed therein except by his own individual consent separately and previously given, in such form and manner as may be prescribed by the Secretary of the Interior. And for the purpose of ascertaining whether the proper number of Indians yield and give their assent as aforesaid, and for the purpose of making the allotments and payments hereinafter mentioned, the said commissioners shall, while engaged in securing such cession and relinquishment as aforesaid and before completing the same, make an accurate census of each tribe or band, classifying them into male and female adults and male and female minors; and the minors into those who are orphans and those who are not orphans, giving the exact numbers of each class, and making such census in duplicate lists, one of which shall be filed with the Secretary of the Interior and the other with the official head

of the band or tribe; and the acceptance and approval of such cession and relinquishment by the President of the United States shall be deemed full and ample proof of the assent of the Indians, and shall operate as a complete extinguishment of the Indian title without any other or further act or ceremony whatsoever for the purposes and upon the terms in this act provided.

The Commission was appointed by the President on the 26th day of February, 1890, and the several members thereof became duly qualified by giving the bond required by section 2 and taking the oath thereunder required, as appears by the files of this Department. The census required to be taken by section 1 was completed and one of the duplicate lists thereof filed with the Secretary of the Interior on the 3d day of January, 1890, and the other with the official head of the band or tribe.

It appears by the report of the Commission that it sought and obtained the assistance of Bishop Whipple and Archbishop Ireland in its labors, and that all that was done was conducted in a spirit of fairness towards the Chippewas. There were distributed among them 500 copies of the act of January 14, 1889, and several hundred copies of the general allotment act of February 8, 1887.

Councils were held at Red Lake, White Earth, Gull Lake, Leech Lake, Cass Lake, Lake Winnibagoshish, White Oak Point, Mille Lac, Grand Portage, Bois Forte and Vermillion Lake, and Fond du Lac.

At Red Lake the assent of all the Indians to the agreement was obtained except a few called "pagans," residing on the northern shore of the lake. The Indians at Red Lake complained of unfulfilled promises, plead for mills and cattle, and that their boundaries might be surveyed in accordance with treaties. They also prayed for an agent, as they were 80 miles from the White Earth Agency. The Red Lake Reservation, two-thirds of which

at least is ceded to the United States, contains 3,200,000 acres, and the number of Indians occupying it is 1,168. The boundaries of the diminished reservation, from which allotments to the Red Lake Chippewas are to be made, are given in the report. The commissioners report that—

This reservation is larger than will eventually be required, but as there are swamps and other untillable lands therein, it can not be reduced until after survey and allotments shall be made.

Whether the surplus lands that may remain after allotments shall have been completed as required by the law can be disposed of without further legislation is a question which will require consideration, but such consideration is not necessary at this time.

The Indians on the Red Lake Reservation were suffering for want of food, owing to the loss of crops the last season.

The Indians of the White Earth Reservation were also suffering for food. They insisted upon the provisions of article 9 of the treaty of September 30, 1854, and that damages should be paid because of the construction of reservoirs on the reservation near the headwaters of the Mississippi, provision for which had been made by the Northwest Commission three years ago, and which negotiations have not been acted on by Congress. No explanation could be given why the provisions of the treaty of September 30, 1854, had not been fulfilled, but the Indians were promised that the best efforts would be given to secure justice in this case, and upon these assurances the acceptance and signing of the propositions made were nearly unanimous. This matter is incorporated in the draught of a bill herewith presented for submission to Congress.

The White Earth Reservation contains 796,762 acres, and the number of Indians occupying the same is 2,044. They complain of want of milling facilities. They have

about 5,000 acres seeded in wheat, barley, and vegetables, but owing to want of rain not more than half a crop will be grown. At least 2,500 acres heretofore cultivated lies fallow for want of seed and teams.

There were but 277 Chippewas at Gull Lake, all of whom signed the agreement and agreed to make their permanent home on the White Earth Reservation as soon as they should be furnished with means to cultivate the soil and subsist until they could make a living.

At Leech Lake Reservation, amid pompous demonstrations, the Commission was received, and the first demand made of them was that there should be settlement of outstanding claims. Nor was the business allowed to proceed until the Commission had given a solemn promise with raised hands that they would to their utmost ability urge the immediate settlement of these unadjusted demands. These Pillager Indians have a claim for lands ceded to the United States under the treaty of 1847, which it is urged should be carefully investigated, and the Pillagers allowed what may be found in equity due them, and also for damages arising from the construction of reservoirs at the headwaters of the Mississippi. For these damages it is recommended that there be paid \$150,000, with 5 percent per annum to date, and \$1.25 per acre for the overflowed lands. The Indians have absolutely ceded to the United States 46,920 acres, which can not be sold, as provided in the act of January 14, 1889, for their benefit, and it is and must be reserved for the overflow caused by the reservoir dams. An item covering the claim for damages by reason of the construction of the dams is also incorporated in the inclosed draught of bill.

The alleged claim of the Pillagers for further compensation for land ceded under the treaty of 1847 is a matter for consideration by Congress, and I would recommend that it be brought to the attention of that body. The state-

ment upon which this claim is based by the Indians is set forth in the report of the Commission.

At Cass Lake a like demand was made by the Indians for the settlement of unsatisfied demands, but all gave their assent and signatures to the proposition.

The Indians at Lake Winnibagoshish depend much upon their wild rice, which they were gathering at the advent of the Commission. The injury done them by the building of the reservoirs is very great. They are destitute, as are those at Cass Lake, of aid from the Government, having no missionary, school, farmer, blacksmith, or physician. The Commissioners observe that the Winnibagoshish Reservation is marked upon the map by township lines, which is erroneous, as the treaty fixes its line by natural boundaries beyond those shown by township lines. This has given much dissatisfaction, as the whites have settled between the two lines and consequently upon the reservation, as the Indians claim. This marking is erroneous, and should be adjusted. All the adults of this band gave their consent to the agreement.

The condition of the Indians at White Oak Point is described as beyond hope of improvement, they being dissipated and dissolute, but they have still intelligence enough to ask that whisky may be kept from the country and that missionaries and school teachers be sent them. They all signed the agreement, and it will be the purpose of this Department to supply and enforce so far as may be in its power the regulations so reasonably demanded. Scattered members of the White Oak Point bands were found at Kimberly, who were healthy in mind and body, unusually bright and careful of themselves, and all of whom were anxious to acquire lands in severalty and the young men eager to find work. They number one hundred, and all except one signed the agreement.

The Indians at Mille Lac were found to be intelligent, cleanly, and well behaved, and of good reputation among

the neighboring whites. White men unfortunately have been permitted to rob them of their pine, and for years to settle upon their agricultural lands, to great injury and fear of the Indians. Squatters are now settling upon this reservation, as the commissioners report. The question of right should be settled at the earliest possible moment, for the greater the delay the more difficult will be the adjustment. All signed the agreement at this place.

The rights of the Indian upon this reservation have been a vexed question, full of difficulties and embarrassments, but it is hoped that this agreement will furnish a basis for its early and final solution.

At Grand Portage the Indians expressed themselves as fully understanding and satisfied with the terms of the act, and signed with cheerfulness and unanimity. They complained that the white fishermen spread so many large nets near their reservation that the Indians were unable to procure a supply of fish for food.

At Bois Forte and Vermilion Lake the Indians seemed timid and distrustful, but they "touched the pen" finally with great solemnity and much formality. They have the best hunting grounds of the Chippewas. They seem willing to learn to till the soil, but ask for assistance in the way of better facilities. Much of the land on the Lake Superior reservations is unfit for cultivation, and the Bois Forte Indians complain that a large amount of their timber is cut without compensation, and is run down Little Fork River to the British Possessions.

Many of the Indians at Fond du Lac are in danger of suffering during the winter and spring, having been denied the right of cutting timber on their reservation. Like all of the Mississippi bands, they feel greatly grieved at the long-continued withholding of the money due them from the Government. On the positive assertion of the commissioners that justice should be speedily done, not only in this respect but in the matter of a palpable error in the

boundary lines of their reservation, they were induced to listen, and finally signed by touching the pen.

This claim for additional land to which the Indians insist they are entitled under the plain and unmistakable meaning of the treaty should have careful consideration and be fairly and speedily adjusted.

The Commission reports:

As the various bands decided to take their allotments on their respective reservations, the Commission told them that the \$90,000 to be advanced and already appropriated would be paid pro rata as soon after the approval of these negotiations by the President as should be practicable, but not later than the coming spring.

The Commission further reports that—

The clause of the act of January 14, 1889, providing for the payment of the interest that may accrue on the permanent fund, was to the Commission obscure, and they promised the Indians that cash payment should be made per capita in equal shares.

It is provided in section 7 of the act of January 14, 1889 (25 Stats., 642):

That one-half of said interest shall, during the said period of fifty years, except in the cases hereinafter otherwise provided, be annually paid in cash in equal shares to the heads of families and guardians of orphan minors for their use; the fourth of said interest shall, during the same period and with the like exception, be annually paid in cash in equal shares per capita to all other classes of said Indians; and the remaining one-fourth of said interest shall, during the said period of fifty years, under the direction of the Secretary of the Interior, be devoted exclusively to the establishment and maintenance of a system of free schools among said Indians, in their midst and for their

benefit; and at the expiration of the said fifty years, the said permanent fund shall be divided and paid to all of said Chippewa Indians and their issue then living, in cash, in equal shares.

This construction by the Commission is deemed reasonable. While there may be some discussion possibly in regard to its validity, it is deemed that it is in harmony with the spirit of the act, and having been made the basis of the Indians' assent it should be adhered to.

The Indians desire that the Government will set aside a sufficient quantity of land on each reserve for Government buildings, such as may be necessary for physician, blacksmith, farmer, carpenters, and for missionaries, traders, etc. The commissioners recommend this, and the reservation, it is submitted, should be made, and the order as to the location and erection of such buildings should be enforced.

The reservation of the necessary and suitable tracts of land for these purposes can be made the subject of an executive order when proper selections shall have been made, which should be attended to before the lands are offered for disposal under the act.

The commissioners further recommend that on each reservation a tract of pine land should be reserved and held by the General Government as might be necessary for their common use, to be so held during the pleasure of the Secretary of the Interior.

I doubt whether this request for the reserving and holding by the General Government of a tract of pine land upon each reservation for the common use of the Indians remaining thereon can be complied with without legislative authority therefor, in view of the terms and conditions of the act to which the Indians have given their consent.

They ask for saw-mills, cattle, agricultural and mechanical implements, which they must have, or they can make no substantial progress.

The commission reports that although the Indians have decided to take allotments on their reservations, it is believed that many may be induced to remove to White Earth, and for this reason it is not prudent to urge individual allotments elsewhere than on the White Earth and Red Lake Reservations at present.

The removal of those who will go to White Earth will take place as soon as provisions can be made for their subsistence. It will be of the greatest benefit to the Indians and to the State to have the removal made.

The Commission ask that there may be granted 10 acres of maple timber for making sugar to each family occupying the same. This is deemed ample and is as much as should be granted. The matter should receive attention when the individual allotments are made to the Indians.

The commissioners state that it is important that the four townships of pine land on the White Earth Reservation should be early estimated and sold, as the timber is liable to be stolen or burned; while on the other hand the swamp lands of valuable cedar and tamarac should be withheld from sale under the pre-emption laws, and sold under the direction of the Secretary of the Interior, in such manner and upon such terms as to him shall seem best for their interests.

I fully concur in the suggestion of the commissioners, that the ceded lands of the White Earth Reservation already surveyed should be disposed of under the terms of the act, at as early a date as possible, but I do not see how the swamp lands referred to and reported to be valuable chiefly for cedar and tamarac can be withheld from sale as requested without further legislation in view of the last clause of section 4 of the act, which reads as follows:

All other lands acquired from the said Indians on said reservations other than pine lands are for the purposes of this act termed "agricultural lands."

And section 6 provides specifically the manner in which unallotted and unreserved agricultural lands shall be disposed of. I think, however, that this request of the Indians should receive favorable consideration by Congress, and that the necessary legislation should be had authorizing the reservation and disposal of the cedar and tamaric swamp lands as desired by the Indians.

It is reported and believed that upon Grand Portage, Bois Forte, and Vermillion Lake Reservations there are valuable mines, and the Indians request that if such are discovered they shall be disposed of by the Secretary of the Interior as best to subserve the interests of the commissioners regarding the request of the Indians for the disposal of mineral lands. I can not see how such a request can be complied with under the law.

The commissioners state that the pine ceded is estimated by various parties from \$25,000,000 to \$50,000,000.

It is reported by the commission that a further appropriation for surveys and examination of the lands will be necessary, and that a small appropriation should be used for the purpose of defraying the expenses of the Indians who may desire to visit the White Earth Reservation, with the expectation of removing there before allotments should be taken or confirmed elsewhere.

Section 8 of the act makes an appropriation of \$150,000 "to pay for procuring the cession and relinquishment, making the census, surveys, appraisals, removal, and allotments, and the first annual payment of interest herein contemplated and provided for." Ninety thousand of this sum is required to pay the first annual payment of interest, leaving but \$60,000 for the other purposes specified. The commission has expended about \$30,000 in procuring the cession and relinquishment, and making the census, leaving about \$30,000 for the surveys, appraisals, and for the removal and allotments provided for in the act. This balance is manifestly insufficient to enable the Department

to accomplish these further provisions of the act, and I therefore concur in the recommendation that a further appropriation be made, and an item for that purpose is included in the draught of bill herewith submitted, which also provides for defraying the expenses of Indians visiting the White Earth Reservation.

The commission further remark that the Red Lake Indians should be encouraged to commence farming and building houses the coming spring, and furnished with cattle and implements, etc.

All these requests of the Indians and recommendations of the commission for furnishing mills, farming implements, cattle, buildings etc., raise the question of an appropriation therefor, which requires to be carefully considered. Section 7 of the act provides the manner for the disposition of the interest on the proceeds arising from the disposal of the lands, as previously recited in this report. It is in said section further provided:

That Congress may in its discretion, from time to time, during the said period of fifty years, appropriate, for the purpose of promoting civilization and self-support among the said Indians, a portion of said principal sum, not exceeding five per centum thereof. The United States shall, for the benefits of said Indians advance to them as such interest as aforesaid the sum of \$90,000 annually, counting from the time when the removals and allotments provided for in this act shall have been made, until such time as said permanent fund, exclusive of the deductions hereinbefore provided for, shall equal or exceed the sum of \$1,000,000, less any actual interest that may in the meantime accrue from an accumulation of said permanent fund; the payments of such interest to be made yearly in advance, and in the discretion of the Secretary of the Interior, may, as to three-fourths thereof, during the first five years, be expended in procuring livestock, teams, farming implements, and seed, for such of the Indians,

to the extent of their share, as are fit and desire to engage in farming; but as to the rest, in cash.

As the \$90,000 already appropriated as first payment of interest was promised by the commission should be paid pro rata in cash, there is no fund out of which the mills, etc., can be purchased, unless Congress shall make an appropriation to enable the Department to provide these necessary and essential things so urged by the commission, and make such appropriation reimbursable from the principal sum arising from the disposal of said lands. An item for that purpose is embraced in the draught of bill herewith.

It is suggested that there are many persons of Chippewa blood dwelling in Michigan, Wisconsin, and elsewhere, but that the chiefs and headmen should be consulted as to the justice of their claims when they assert the right to the benefits under recent negotiations.

It will be perceived that some portions of the recommendations of the commissioners may be carried into effect through orders of this Department, and the same will be done to the extent possible; but, as to those matters dependent upon further legislation, the President will have to request action by Congress. The chief of these will be to make such appropriations as will pay the demands of the Indians under previous treaties, and for the damages done by the reservoirs established upon the reservations. This matter has long been pending, and its adjustment seems to be demanded by ordinary good faith and the plainest principles of justice.

The \$150,000 hereinbefore mentioned, recommended for the damages done by the overflow of the reservation dams, with 5 per cent interest, should no longer be refused.

There should be a due appropriation made, also, for the establishment of schools, and the employment of farmers, blacksmiths, and physicians, and particular provision

made to preserve these Indians from want during the remainder of the winter and coming spring.

The first section of the act provides for an accurate census of each tribe or band, to be taken by the said commissioners while engaged in securing such cession and relinquishment, classifying them into male and female adults, and male and female minors; and the minors into those who are orphans and those who are not orphans; giving the exact number of each class.

* * * *

The commissioners also submit reports showing the number of male adults of each of the separate bands and the number of such male adults assenting to the act of which the following is a summary:

	Male adults	
	Total	Assenting
Red Lake and Pembina bands:		
Red Lake	303	247
Pembina	83	77
Total	386	324
Mississippi bands:		
White Earth	284	270
Gull Lake and scattering	61	57
White Oak Point	176	172
Mille Lac	213	189
Total	734	688
Pillager and Lake Winibigoshish bands:		
Leech Lake	324	217
Otter Tail	164	144
Cass Lake	67	65
Lake Winibigoshish	45	40
Total	600	466
Grand Portage, Bois Forte, and Fond du Lac bands:		
Grand Portage	73	72
Bois Forte	228	211
Fond du Lac	157	123
Total	458	406
RECAPITULATION		
Red Lake and Pembina bands	386	324
Mississippi bands	734	688
Pillager and Lake Winibigoshish band	600	466
Grand Portage, etc., bands	458	406
Total	2,178	1,884

This summary shows that the total number of male adults is 2,178 and that 1,884 of that number signed their acceptance and consent to the act, being over 86 per cent, of such male adults, and more than the requisite "two-thirds of the male adults over eighteen years of age of the band or tribe of Indians occupying and belonging to" each of the several reservations, and more than "two-thirds of the male adults of all the Chippewa Indians in Minnesota," as is required in the case of the Red Lake Reservation. (Section 1 of the act.)

The commissioners have not submitted their recommendations in separate form, and what is herein stated has been gathered from the general purport of their report, all of which will be more fully considered by the appropriate committees, with the view of doing complete justice to this tribe, which has reposed its confidence so firmly and fully in the Government and relied upon its justice.

It is provided in section 1 of the act authorizing negotiations "that all agreements therefor shall be approved by the President of the United States before taking effect."

The agreement or acceptance and consent of the Indians to the act, herewith, in ten parts, is therefore respectfully submitted for your action.

Before the ceded lands within any of the reservations can be disposed of as contemplated in the act, all of said ceded lands must be surveyed as the public lands are surveyed, after which they are to be carefully examined in 40-acre lots, by competent and experienced examiners to be appointed for that purpose, and classified into "pine lands" and "agricultural lands," the pine lands are then to be valued and listed, etc. (section 4), and finally proclaimed as in market and offered for sale in the manner prescribed in section 5.

The agricultural lands not allotted nor reserved for the use of the Indians, after having been surveyed, are to be

advertised for thirty days and disposed of to actual settlers under the provisions of the homestead laws, each settler being required to pay \$1.25 per acre for the lands so taken by him.

Besides all this it will be necessary to ascertain how many and who of the Indians of the several reservations elect to take allotments on the reservations where they now live, as by the terms of the act they are permitted to do, instead of being removed to White Earth Reservation (section 3). It is not seen how any of the ceded lands, except possibly those of the Red Lake Reservation and the four townships ceded in the White Earth Reservation, can be offered for sale or settlement until the Indians of the several reservations who elect to remain and take allotments where they are shall have signified their intention to so remain and shall have made their individual selections for allotment; nor can the Red Lake ceded lands be so offered until the surveys, examinations, classification, etc., shall have been fully completed.

Your approval, therefore, of the agreement will not open any of the reservations to white settlement, nor render them subject to occupancy or disposal in advance of the complete fulfillment of the preliminary work of surveys, examinations, etc., and in the case of the "pine lands," after all these preliminaries have been met, the lands must be "proclaimed as in market and offered for sale."

It is perhaps unnecessary, then, that any action should be had at this time other than the approval of the agreement.

Advertising here to the recommendation of the Commission that the Indians of the Red Lake Reservation be allowed to utilize the dead and fallen timber upon their reservation until such time as the survey, appraisalment, etc., shall be made, I think this is reasonable, and it seems

to me can be done under authority conferred by the act of February 16, 1889 (25 Stats., 673), which provides:

That the President of the United States may from year to year in his discretion under such regulations as he may prescribe, authorize the Indians residing on reservations or allotments, the fee to which remains in the United States, to fell, cut, remove, sell, or otherwise dispose of the dead timber, standing or fallen, on such reservation or allotment for the sole benefit of such Indian or Indians.

Under the authority thus conferred, the President, on October 16, 1889, authorized the Indians on the White Earth, *Red Lake*, and White Oak Point Reservations to cut and sell dead and down timber on their respective Reservations and I see no reason why the cutting and sale of the dead and down timber under the authority so granted and the regulations then prescribed may not be continued until the lands are placed upon the market as provided in the Chippewa act of January 14, 1889.

I invite attention to the fact that the instruments presented by the Commission as the result of the negotiations, and as the evidence that the Chippewa Indians in Minnesota have given their consent in writing to the cession and relinquishment of their title and interest in and to the lands as therein set forth, comprise ten parts, marked separately as A, B, C, D, E, F, and H, G, I, K, and L; these, however, in fact constitute as a whole one instrument, and the part marked C, and entitled "Signatures Roll Mississippi Chippewa Indians, White Earth Reservation, Minnesota," should be placed and considered as the first part, for the reason that it is the only part that embraces the text of the act under and for the purposes of which the Commission was appointed.

This is considered necessary, in view of the fact that the act is not recited in the other parts of the instrument, but is referred to therein as follows: "Which said act is

embraced in the foregoing instrument," meaning evidently that part marked C, etc., as above stated.

With this as explanation, and as matter of record for proper understanding of the instruments, I think it would nevertheless be well for the approval of the President to be indorsed upon each of the separate parts of the said instrument.

I further recommend that a copy of the report of the Commission, and of all its accompanying papers (except the census rolls, which are bulky), with copy of this letter of the Department reviewing the same, be submitted to Congress for its information, together with the accompanying draft of bill for making the appropriations herein suggested.

I have the honor to be, very respectfully, your obedient servant,

JOHN W. NOBLE,
Secretary.

A BILL to enable the Secretary of the Interior to carry out an act, entitled "An act for the relief and civilization of the Chippewa Indians in the State of Minnesota, approved January 14, 1889," and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums, or to much thereof as may be necessary be, and the same are hereby, appropriated out of any moneys in the Treasury, not otherwise appropriated, to be immediately available, to enable the Secretary of the Interior to carry out an act entitled "An Act for the relief and civilization of the Chippewa Indians in the State of Minnesota, approved January fourteenth, eighteen hundred and eighty-nine, and for other purposes:"

For amount due the Chippewa Indians of Lake Superior and Mississippi, arising from balances of appropriations under treaties with said Indians, and covered into the Treasury between the years eighteen hundred and forty-three, and eighteen hundred and seventy-eight, inclusive; also, the aggregate difference between the coin value of payments made in currency during the years eighteen hundred and sixty-three and eighteen hundred and sixty-four, at the dates of Treasury warrants, and the amounts due in coin by treaty stipulations, with interest at the rate of five per centum per annum, from the date of said Treasury warrants to June thirtieth, eighteen hundred and ninety, the sum of one hundred and ninety thousand dollars, or so much thereof as may be required, to be expended by the Secretary of the Interior in the purchase of such articles as he may deem best, or in the payment of cash, to be apportioned in accordance with article eight of the treaty proclaimed January twenty-ninth, eighteen hundred and fifty-five, one hundred and ninety thousand dollars.

For compensation for losses and damage sustained by the Chippewa Indians on account of the building of dams and reservoirs on Lake Winnebagoishish, Cass Lake, and Leech Lake, the sum of one hundred and fifty thousand dollars, with interest at the rate of five per centum per annum from the seventeenth day of September, eighteen hundred and eighty-six, up to and including June thirtieth, eighteen hundred and ninety, the sum of one hundred and eighty thousand dollars, or so much thereof as may be necessary, to be paid in cash, per capita, in two yearly installments as follows: Two-thirds to the Pillager and Lake Winnebagoishish bands, now residing or entitled to reside on the Leech Lake, Lake Winnebagoishish, and Cass Lake Reservations, and one-third to the Mississippi band, now residing or entitled to reside on the White Earth, White Oak Point, and Mille Lac Reservations, one hundred and eighty thousand dollars.

For compensation for forty-six thousand nine hundred and twenty acres of land at one dollar and twenty-five cents per acre, on account of land overflowed in the construction of dams and reservoirs on Lake Winnebagoishish, Cass Lake, and Leech Lake Reservations, to be divided in the same manner as the compensation for losses and damages above referred to, and to be paid in cash, per capita, fifty-three thousand six hundred and thirty dollars.

For the purchase and erection of saw and flour mills, agricultural implements; for surveys, appraisals, removals, and allotments; for payment of expenses of delegations of Chippewa Indians to visit the White Earth Reservation; for the erection and maintenance of day and industrial schools, for subsistence and pay of employes, and for such other purposes as the Secretary of the Interior may deem proper, the sum of two hundred and fifty thousand dollars; *Provided*, That this amount shall be reimbursed to the United States from the proceeds of sales of land ceded by the Chippewa Indians under the act of January fourteenth, eighteen hundred and eighty-nine, two hundred and fifty thousand dollars.

SEC. 2. That the Secretary of the Interior is hereby authorized and directed to pay, per capita, to the Chippewa Indians entitled to it, under the act of January fourteenth, eighteen hundred and eighty-nine, the sum of ninety thousand dollars, appropriated by section eight of said act of January fourteenth, eighteen hundred and eighty-nine (Statutes 25, page 645), as first annual payment of interest contemplated and provided for, in lieu of expending it in conformity with the provisions of the above-mentioned act of January fourteenth, eighteen hundred and eighty-nine.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, January 2, 1880.

SIR: Agreeably with your personal request, the 31st ultimo, I have the honor to transmit herewith the final report (in triplicate) of the Commission appointed to negotiate with the different bands or tribes of Chippewa Indians in the State of Minnesota, under authority of the act of January 14, 1889 (25 Stat. 642), together with the several agreements entered into, the census of the Indians, and the proceedings of the several councils held with them.

Very respectfully, your obedient servant,

T. J. MORGAN,
Commissioner,

The SECRETARY OF THE INTERIOR.

UNITED STATES CHIPPEWA COMMISSION,
St. Paul, Minn., December 18, 1889.

SIR: We have forwarded to your Department by express, December 10, 17, and 18, one copy of the census taken by the Commission of the Chippewa Indians of the State of Minnesota; two copies of the stenographic record of proceedings in the councils held with them by the Commission; one copy of the agreements with the bands in the State, with the original signatures of the Indians attached; and inclose herewith one copy of a summarization of the census, and one copy of a summary showing the number of male adults in the various bands and the number of those who signed the agreements.

I shall be obliged if the receipt of the various papers is acknowledged.

Respectfully,

HENRY M. RICE,
Chairman.

Hon. T. J. MORGAN,
Commissioner of Indian Affairs,
Interior Department, Washington, D. C.

UNITED STATES CHIPPEWA COMMISSION,
St. Paul, Minn., December 26, 1880.

SIR: In obedience to instructions from your office, dated May 24, 1889, accompanied by "An act for the relief and civilization of the Chippewa Indians in the State of Minnesota," approved January 14, 1889, this Commission met in this city June 11, 1889. After several meetings, it was deemed proper, owing to the deep interest the Right Reverend Bishop Whipple, and his grace Archbishop John Ireland, had taken in the welfare of the Chippewas, that they should be consulted. A copy of the following note was addressed to each, dated June 15, 1889

DEAR SIR: Your church has missions established among the Chippewa Indians in the State of Minnesota, with whom we are instructed to negotiate.

On account of the intimate knowledge you have, and the deep interest you have manifested in the elevation of this race, we deem it proper you should be represented, and it will be a pleasure to the members of this Commission to have with us some one delegated by you who may explain to the Indians any matters affecting their interests, which may be presented to them.

In response to this invitation, Bishop Whipple selected Rev. E. S. Peake, who had long resided with these Indians, and Archbishop Ireland selected the Rev. Father Aloysius, O. S. B., a resident priest among them, both of whom accompanied us to Red Lake.

That nothing should be omitted that could enlighten the Indians as to the intent of the Government, we had printed 500 copies of the act of January 14, 1889, and several hundred of the "Act to provide for the allotment of lands in severality to Indians," etc., approved February 8, 1887. These we caused to be distributed among the missionaries, teachers, and other employes of the Government, as well as traders, mixed bloods, and Indians who read the English language.

Owing to their destitute condition, the Indians were scattered in search of food, their crops having failed the previous season, and much time was taken in collecting them.

The first council was held at Red Lake, June 29, where we remained until July 8. We found them intelligent, dignified, and courteous, but for several days indisposed to give a favorable hearing. The propositions were not as favorable as those made three years ago, which did not require the proceeds of their reservation to be shared with others. The chiefs were opposed to breaking up the tribal relations, fearing that if they were so broken their power and influence would be gone. The young men, however, were heartily in favor of the allotment plan, knowing that if their lands were held in severalty, each man's earnings could be used for his own advantage, instead of, as heretofore, being necessarily shared with the idle, but they did not like the provision for providing with other bands, although when it was explained to them that the country from Lake Superior to and beyond the Red River of the North, was, by the united efforts of all the Chippewas, taken by conquest from the Sioux, and that had it not been for such united efforts, they could not have taken or held the Red Lake Reservation; they admitted the correctness of this statement, but thought some of their neighbors had received more than their due proportion of annuities from former sales.

Among themselves, boundary lines were not very strictly regarded, as those of one band intermarried with and joined such other band as was most agreeable; in fact, the young men roamed about at will. The Chippewas of this State did unquestionably, in early times, hold their lands in common. It was so in 1825, at the time of the treaty at Prairie du Chien, and no other idea would ever have been entertained had not the mistaken policy of purchasing a tract here and there from the bands contiguous thereto been adopted. Of the vast cessions heretofore made, there is little, and in many cases nothing, left to show any benefit derived by the Indians therefrom. This is owing largely to the hurtful practice, so long followed, of permitting their tribal relations to exist.

As a result of the reverence, the young men have for their chiefs, they would not speak in council, but a delegation called upon the Commission after adjournment and requested it should have patience, as they had resolved to have a council among themselves, in hope of influencing their leaders, and if successful they would continue to keep in the background. They clearly saw the advantage to them of the propositions made, including the offer of the protection of the law. Their efforts were successful and all of their bands cordially gave their assent by signing the agreement, except a few called pagans, residing upon the north shore of the lake; their head chiefs and others, however, said they had no objections, and would sign when "they saw fulfilled the promises made." We found them very poor, having comparatively nothing to work with, not even farming implements. Years ago they had a saw-mill, but from neglect, when a small expenditure would have kept it in repair, it was permitted to go to decay. So for years they have not had lumber to build new or repair old structures, or even make a coffin. They earnestly plead for a saw-mill, and also cattle and such other helps as would enable them to commence at once to improve their condition.

They claim, and we think with at least the appearance of truth, that their boundary as surveyed is not in accordance with the treaty lines. We recommend that an engineer of repute be employed to examine and report the facts.

They earnestly asked that they might be permitted to utilize the dead and fallen timber upon the reservation until such time as the survey and appraisal shall be made. As this will be of great help to them and the trees will otherwise be destroyed by fire, worms, and rot, we agreed to support this most reasonable request.

They also begged that they might have an agent, as this reservation is so far (80 miles or more) from the White Earth Agency.

We think the Red Lake Indians, if properly added, will become self-supporting and useful citizens.

The Red Lake Reservation, which they cede to the United States, contains 3,260,000 acres. The number of Indians occupying the same is 1,168.

The boundaries of the diminished reservation, from which allotments to the Red Lake Chippewas are to be made, are as follows:

Commencing at Thief River at a point on the dividing line between Marshall and Polk Counties, as designated on a map published by Rand, McNally & Co., of Chicago, in 1888; thence easterly to a point on the northwesterly shore of Upper Red Lake; thence along the northern shore of said lake to a point due north of a point 1 mile due east from the eastern end of the Lower Red Lake; thence southwesterly to a point on Hay Creek 1 mile from its mouth thence due south to a point due east of a due westerly line which when extended will run between what is known as the most southerly sugar-bush on Red Lake road to White Earth, and north of what is called the "Big Marsh" to Clearwater River (said line being about

6 miles south of Red Lake); thence down Clearwater River to the southwesterly reservation line; thence along said line to the place of beginning (excepting the right to use in common all the water-ways within the above described limits).

This is larger than they will eventually require, but as there are swamps and other untillable lands therein, it can not be reduced until after survey and allotment shall be made.

White Earth Reservation, occupied by the Chippewas of the Mississippi, Pembinas, and Otter Tail Pillagers, contains 796,672 acres, of which they cede to the United States four townships of pine land, viz: Townships 143, 144, 145, and 146, range 37 west. Residing on this reservation are Chippewas of the Mississippi, 1,169; Otter Tail Pillagers, 657; Pembinas, 218.

The first council was held at White Earth July 17, and the last on July 29. As with the Red Lake Indians, they were suffering for want of food, owing to the loss of their crops by early and severe frosts the season before. All were strenuously opposed to entertaining any propositions until the provisions of article 9, of the treaty of September 30, 1854, made at La Pointe, Wis., was fulfilled, and a settlement had for the damages to their reservation near the headwaters of the Mississippi, caused by building the reservoir dams; provisions for an adjustment in each case was made by the Northwest Commission three years ago in negotiations with them and the Leech Lake Indians, which negotiations have not been acted upon by Congress.

In regard to the treaty of September 30, 1854, it was impossible for us to explain why its plain and unquestioned provisions had not been fulfilled. The Chippewas employed an agent, and a delegation accompanied him to Washington some years ago, and after urgently insisting upon a settlement, there was found due to them the

sum of \$118,400, which had accrued from balances that had been covered into the Treasury between the years 1843 and 1878. This amount has never been questioned as being due under the treaty stipulations, and in the opinion of this Commission should be included in regular estimates. We gave the most solemn promises that our best efforts would be given to secure justice in this case, believing that we but voiced the intent of the Government in so doing. After giving assurances that justice would be speedily done and that we would bring the attention of the Department to those claims, the acceptance and signing of the propositions made was nearly unanimous.

The following will show that the Indians had been officially informed of the amount due them up to and including the year 1878. (Two-thirds of this amount goes to the Chippewas of Lake Superior, and one-third to those of the Mississippi.)

OFFICE OF INDIAN AFFAIRS,
Washington, December 8, 1884.

SIR: I am in receipt of your letter dated the 29th ultimo, in which you state that four years ago you were called to this city to converse on matters concerning your reservation: that while you were informed that there was due to your people the sum of \$118,400; that said sum would be paid in annual installments; that 50,000 thereof was drawing interest, and that said interest would be paid to the Chipewas.

You want to know why these promises have not been kept, and that you be informed in brief what you are to expect, etc.

In reply I have to state that on the recommendation of this office, on the 5th day of April, 1880, a bill was introduced in Congress to authorize the Secretary of the Interior to fulfill certain treaty stipulations with the Chippewa Indians of Lake Superior and Mississippi. This bill

proposed an appropriation of the sum of \$118,406.29, being the total amount arising from balances of appropriations under treaties with said Indians and covered into the Treasury between the years 1843 and 1878, inclusive. And the aggregate difference between the coin value of payments made in currency during the years 1863, 1864, and the amounts due in coin by treaty stipulations with interest at 5 per cent, per annum, from date of Treasury warrants to February 6, 1880.

Section 2 of this bill provided that of the above amounts \$38,400.29 should be paid to the said Indians and that the remainder, \$80,000, should remain in the Treasury to draw interest at 5 per cent., said interest to be paid annually per capita or expended for the benefit of the Chippewa, under the direction of the Secretary of the Interior.

This bill never became a law through the failure of Congress to take action, and this office has exhausted its endeavors to obtain the appropriation named.

Very respectfully,

H. PRICE,
Commissioner.

ANKE-WAIN-ZE,
Head Chief of Lac Courte D'Orielles.

(Care United States Indian Agent, La Pointe Agency, Wis.)

See also the speech of Hon. Jacob H. Stewart, of Minnesota, in the House of Representatives, delivered Monday, February 24, 1879, on the bill (H. R. 6471) making appropriations for civil expenses of the Government for the fiscal year ending June 30, 1880, and for other purposes, as printed in the Congressional Record, March 1, 1879, under "Sundry Civil Appropriation Bill." The speech referred to contains the report of the committee upon this subject.

Messengers are now out, sent by the Chippewas of Lake Superior to those of the Mississippi, inviting them

to send delegates to meet in convention at Ashland, Wis., on January 11 next, for the purpose of employing claim agents to prosecute and collect the amount found due, to, and including the year 1878, as stated by the Indian Office, April 5, 1880, viz, \$118,400, with interest to date at 5 per cent., \$59,200; total, \$177,600.

The claim agents expect the Indians to allow them 15 per cent. of the amount. It can but be determined to the Indians to be thus harassed, kept in suspense, and finally compelled to pay to others a large commission in order to secure the payment of a just claim against the Government.

These Indians have an old saw-mill, but for want of repairs it can not be used.

Their flouring-mill, not being properly cared for, was burned a short time ago, but for want of repairs had not been running for several years. Consequently the Indians such as had grain have been compelled to go many miles to have it ground.

When in the settlements of the whites, to say nothing of the expense and loss of time, they are subject to unavoidable temptations. Many have not teams and have to employ others to take their grain to the mills, and after paying transportation and toll, leaves but a moiety for their use. The Indians made special complaints in regard to the want of milling facilities. At their request, with the aid of Agent Schuler, we investigated the condition of their farms, and found about 5,000 acres seeded in wheat, oats, barley, and vegetables, but owing to the want of rain not more than half a crop will be grown. At least 2,500 acres heretofore cultivated lies fallow for the want of seed and teams.

Here, as well as at Red Lake, Rev. Mr. Peake, rendered valuable services.

After completing our work at White Earth we went to Gull Lake, where we found a small band, numbering 277, belonging to the Chippewas of the Mississippi. Some of them had attended the councils at White Earth, and all seemed familiar with the propositions submitted to them. We, however, went through with the explanations in detail, and after consultation among themselves all signed the agreement. They promised to make their permanent home on the White Earth Reservation as soon as they should be furnished with means to enable them to cultivate the soil and to subsist until they can make a living. This agreement was concluded on the 5th of August.

We held the first council at Leech Lake, August 8. We were received at this place with all the pomp and show the Indians could display. Guns were fired and every flag in the settlement was flying. A guard of honor, dressed in war feathers and decorated with paint, greeted us with open arms. We were informed that this guard was for our protection, especially to keep the pillagers from giving us any personal annoyance. Faithfully did they perform their duty, not only by day but by night. No Indians were permitted to see us unless accompanied by a detail from this polite and considerate guard, which was master of the situation. The party that originated and organized this body, knowing the object of our mission from the copies of the act we had sent in advance, as well as from persons of their own band who had attended the councils at Red Lake and White Earth, were fully determined that no business should be transacted between the band and the Commission until they should be satisfied that it had the authority to provide for the settlement of outstanding claims. They were polite and courteous, but were resolved to keep us, as well as the uncertain of their band, under the restraint of the guard. They felt that they had been grievously wronged.

After a few days we broke their lines, inducing the chiefs to speak in council who for several days had not

been heard. Stormy debates took place in council, accompanied by threats, which afterwards, at the request of the chiefs, the commission directed to be stricken from the minutes.

These Indians, even the most bitterly opposed, said that had we come empowered to adjust unsettled matters they would not have made any objections to the propositions, nor would they have detained us long. Enough, however, gave their consent as required in writing. Others said that they would assent when they saw a disposition on the part of the Government to right the wrongs they had suffered. We were kept there until August 22. We had to give a solemn promise with raised hands that we would to our utmost ability urge the immediate settlement of unadjusted claims.

On the 21st of August, 1847, the Pillager Indians at Leech Lake, Minn., ceded to the United States a tract of land bounded as follows:

Beginning at the south end of Otter Tail Lake; thence southerly *on the boundary line between the Sioux and Chippewa Indians*, to Long Prairie River; thence up said river to Crow Wing River; thence up Crow Wing River to Leaf River; thence up Leaf River to the head of said river; and thence in a direct line to the place of the beginning.

This tract contains nearly 700,000 acres, and was sold to the Government for about \$15,000. The Pillagers parted with it, believing, as they were told, that it was for the occupancy of the Menomonee Indians, a tribe at peace with them as well as with the Sioux. For generations a fierce war had raged between these two last-named tribes. The pillagers believed that if the friendly Menomonees were between the belligerents peace might follow. By the treaty of October 18, 1848, the United States ceded to the Menomonees the above-described tract in exchange for all their lands in the State of Wisconsin.

The Menomonees, manifesting a great unwillingness to remove west of the Mississippi, by treaty dated May 12, 1884, receded to the United States the foregoing tract in exchange for a part of their old home in Wisconsin and the sum of \$242,686, for which the Pillagers received less than \$15,000. According to Indian reasoning the consideration stipulated was never paid; that is, the occupancy of said tract by the Menomonees, thus protecting them from the incursions of Sioux war parties.

The Pillagers, at the time of the cession, were told by the commissioners that the said tract would be held as Indian lands are usually held, and that their friends, the Menomonees, would occupy it. The commissioners were Isaac A. Verplank and Henry M. Rice. The Pillagers from the time that they heard that the tract was not to be occupied by the Menomonees, as stipulated, have to this day considered that they have been injuriously overreached. They have never ceased to complain of this, and never will until reparation shall be made. We can not too strongly urge that the Government cause this matter to be carefully investigated, and in some way allow the Pillagers what may be found to be in equity due them. Indians are not unreasonable when fairly dealt with, and as they are about starting out as citizens under this act, aid will be of greater benefit now than heretofore, and is more needful now than it can be at any future time.

As to the damage done by the overflow of the reservoir dams, the Department is respectfully referred to the following communication:

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, December 19, 1883.

SIR: By a provision in the river and harbor act of June 14, 1880 (21 Stat., 193), the sum of \$75,000 was appropriated for the reservoirs at the headwaters of the Mississippi River, to be used in the construction of a dam at

Lake Winnebagoishish, with the proviso that all injuries occasioned to individuals by overflow of their lands shall be ascertained and determined by agreements, in accordance with the laws of Minnesota, and shall not exceed in the aggregate \$5,000, etc.; and by a provision in the river and harbor act of March 3, 1881 (*Id.*, 481), the sum of \$150,000 was appropriated for reservoirs upon the headwaters of the Mississippi River and its tributaries, and the Secretary of the Interior is authorized and directed to ascertain what, if any, injury is occasioned to the rights of any friendly Indians occupying any Indian reservation by the construction of any of said dams, or the cutting or the removal of the trees or other materials from any such reservation for the construction or erection of any of said dams, and to determine the amount of damages payable to such Indians therefor, which damages, when determined, to be paid by the United States, with the proviso that such damages shall not exceed 10 per centum of the sums hereby and heretofore (act 1880, \$75,000) appropriated for the construction of said reservoirs.

Under these provisions of law Messrs. A. Barnard, of Minneapolis, Thomas Simpson, of Winona, Minn., and Louis Morel, of this office, were designated by the Department, on the 11th of August, 1881, as special agents to ascertain the injury occasioned to friendly Indians by the construction of the reservoirs at Lake Winnebagoishish and Leech Lake, and to determine the amount of damages payable to such friendly Indians as might suffer on account of the construction of said reservoirs; and on the 20th of August the necessary instructions were issued to said agents, defining their duties, and the manner of proceeding to ascertain and determine the damages resulting to friendly Indians.

On the 6th of October, 1881, these agents submitted their findings and award, which was submitted to the Department on October 18, following, for consideration,

and, if approved, to be forwarded to the Secretary of War for settlement under the act of 1881.

The injuries arising from the construction of these reservoirs and the assessments of damages to friendly Indians were considered by these agents and reported in separate schedules, one for Lake Winnebagoishish and the other for Leech Lake, being classified as (1) injuries to individual property, and (2) injuries to tribal property.

The damages were, in the aggregate, at Lake Winnebagoishish, assessed at \$8,393.30, and those at Leech Lake, \$7,073.60.

These valuations, amounting jointly to \$15,466.90, were approved by the Department and forwarded to the War Department, and the money was placed to the credit of the Interior Department for distribution under the award.

The Indians protested against this assessment as being entirely too small, and at one time there was danger of a serious outbreak, but the violence was prevented by the friends of the Indians, with the hope that the question of damages would be reconsidered.

These facts having come to the knowledge of the Department, it was determined to appoint a new commission to assess the damages and on December 23, 1882, you appointed and commissioned for that purpose General H. H. Sibley and William R. Marshall and Rev. J. A. Gilfillan, who were to serve without compensation other than their necessary expenses. Subsequently General Sibley, on account of ill health, resigned, and R. Blakely, esq., was appointed to fill his place.

I am now in receipt, by Department reference, of the report of these gentlemen, dated the 4th instant, submitting in detail the result of their findings. They state that it was entirely out of the question for the commission to arrive at a reasonable agreement with the Indians as to the

amount of damages by the reason of the construction of the dams; and that the amount of land overflowed has been materially reduced, as indicated in letter of Major Allen, of October 24, 1883, the amount being only 46,920 acres, instead of 101,940 acres, as heretofore reported, and in the aggregate is divided as follows, viz:

Winnebagoish reservoirs, 23,240 acres; Leech Lake reservoirs, 28,680 acres.

The commission make awards for timber cut, rock taken, and damages to industries, but none for land taken.

Lake Winnebagoish and Cass Lake:

Personal property	\$1,936.50
Tribal property	3,649.58
	<u>5,586.08</u>

Leech Lake:

Personal property	105.00
Tribal property	1,075.00
	<u>1,180.00</u>

White Earth and Mississippi bands, pine cut, \$3,272.10.

The Commission estimate for these latter bands an annual damage for rice, at 10 cents per pound, \$8,610, and for hay, at \$28 per ton, \$9,800; total \$18,410.

For the Indians at Lake Winnebagoish and Cass Lake they estimate the annual damage as follows, viz:

Hay	\$3,640.00
Loss of fish	4,350.00
Loss of cranberries	300.00
Loss of sugar	100.00
Total	<u>8,390.00</u>

The Commission say that the Indians will be very materially damaged in their industries and will require permanent provision. The total damage awarded by the Commission, outside of resultant damages, is as follows, viz:

Individual property	\$2,041.50
Tribal property	<u>7,996.68</u>

Total 10,038.18

The total annual damage awarded by them is \$26,800.

The estimate of the Commission for annual damages for rice at 10 cents per pound, and hay at \$28 per ton, would appear at first sight to be rather extravagant, but when we consider that over 46,000 acres of land are taken from the Indians without any compensation whatever, it is believed that the estimate is not too high.

There are funds now at the disposition of this Department, under the act of 1881, sufficient to pay the damage awarded for individual and tribal property, \$10,038.18, but as the Indians refused to accept the award in this respect of the former Commission, which is some \$5,000 greater than that of the present Commission, they will hardly accept the latter unless an appropriation is made to pay the annual damages awarded by the latter Commission.

In accordance with the award of the Commission it will require \$36,838.18 for present payment, of which amount, as before stated, \$10,038.18 is available, leaving \$26,800 to be provided for.

As the acts of 1880 and 1881 make provision for payment of present damages only and some for the payment of annual damages, I am of opinion that this sum for the present year should be treated as a deficiency, and recommend that Congress be asked to attach an item to the deficiency bill, already submitted by this Department, appropriating the sum of \$26,800, and that annually here-

after an appropriation of \$26,800 be made in order to carry out the award of the Commission.

Very respectfully, your obedient servant,

H. PRICIE, *Commissioner*.

The SECRETARY OF THE INTERIOR.

It appears by this that the award, amounting to \$15,466.90, was without hesitation rejected by the Indians. Is it surprising that they should have done so, when the United States engineer, Major Allen, reported that the number of acres overflowed amounted to 46,920, which overflow destroyed their gardens, their rice fields, their hay lands, their fish, and their grave-yards? It is an annual and perpetual loss. The award did not allow 40 cents an acre for the land, to say nothing of the damages occasioned by the loss of their almost sole subsistence.

On December 22, 1882, a new commission, consisting of General and Ex-Governor William R. Marshall, Capt. R. Blakeley, and Rev. J. A. Gilfillam, was appointed; practical, thorough-going men, in whose judgment every one had confidence. After a careful and exhaustive examination these gentlemen estimated the annual damages at \$26,800, and the damages to individual and tribal property at \$10,038.18.

The Commissioner of Indian Affairs then approved of this award. He said:

In accordance with the award of the Commission it will require \$36,838.18 for the present payment, of which amount, as before stated, \$10,038.18 is available, leaving \$26,800 to be provided for; and that annually thereafter an appropriation of \$26,800 be made, in order to carry out the award of the Commission.

The Secretary of the Interior, in approving of the foregoing, says:

No award is made by the Commission for or on account of the land taken and occupied in the construction of the reservoirs.

By the fourth article of agreement made by the Northwest Indian Commission (not acted upon by Congress) on the part of the United States and the Pillager Indians, it was agreed that the United States would pay said Indians \$150,000, which should be in full satisfaction for losses and damages sustained by them, one-third of said sum to be paid to the Chippewas of the Mississippi, and two-thirds to the Pillagers, etc., from which agreement they never heard until informed by us.

From information received on this subject, this Commission can not recommend a less award than the amount mentioned, viz, \$150,000, with 5 per cent. interest per annum to date, and \$1.25 per acre for the overflowed lands. These Indians have absolutely ceded to the United States 46,920 acres, which can not be sold as provided in the act of January 14, 1889, for their benefit, as it is and must be reserved for the overflow caused by the reservoir dams.

From Leech Lake we went to Cass Lake, holding our first council there August 23, and the last on the 26th of the same month. As many of the Indians of this band attended all the councils at Leech Lake, all they required was that explanation should be made to those who were not present at the latter place. They in strong terms asked that unsettled matters be liquidated as soon as possible. All freely gave their assent and signatures to the propositions.

From there we went to the Lake Winnebagoish band. We had much trouble in assembling them as they were out gathering wild rice. Our first council was held August 31, and the last September 2, but we were in almost constant session day and night, as they were anxious to return to their rice fields. Several of the chiefs had at-

tended the councils at Leech Lake, and seemed well informed of the object of our visit. The injury done them in building the reservoir dams was without doubt very great. Two or three of their burying grounds were so washed by the overflow that the remains of their buried dead were unearthed and scattered along the shore. This desecration but added poignancy to the sorrow caused by the loss of subsistence.

Here, as at Cass Lake, they felt deeply hurt that those who were in the greatest want—the old, the sick, and the helpless young—should have been compelled to *appear in person* at Leech Lake when their annuities were paid or go without them. This harmful practice could be easily avoided by paying to the representatives of such, with the approval of the chief, the amount due. These Indians, like those of Cass Lake, are destitute of aid from the Government, having no missionary, school, farmer, blacksmith, or physician. The Winnebago Reservation is marked upon the map by township lines, which is erroneous, as the treaty fixes its line by natural boundaries beyond those shown by township lines. This has given much dissatisfaction, as whites have settled between the two lines, and consequently upon the reservation, as the Indians claim. The matter should be adjusted. Every adult male of the band gave his assent to the agreement.

On September 5 we held a council with a part of the White Oak Point Indians at Payment Point; on the 6th at White Oak Point, and on the 7th near Grand Rapids. Most of these Indians showed such signs of dissipation and consequent degradation as would lead one to fear they were beyond the hope of improvement. They seem aware of their condition, and tremblingly asked that whisky might be kept from the county. They also asked that missionaries and school teachers be sent them. They seemed like lost wards of the Government, who had fallen into the hands of their worst enemies, the whisky sellers. All present gave their signatures.

From the last point we sent our messengers to find the scattered members of other White Oak Point bands, and succeeded in gathering them at Kimberly, a water tank station on the Northern Pacific Railroad, where we held the first council September 19, and our last on the 23d. The two leading chiefs had attended the councils at White Earth, and had made known to their people the object of our mission. We found these people healthy in body and mind, unusually bright, and careful of self. All were anxious to acquire land in severalty, and the young men were eager to find work. Their very appearance indicated a working and industrious class. They said they had been forced to look for subsistence outside of their reservation. Their bands numbered one hundred men. All except one signed the agreement.

On the 2d of October we met the Mille Lac Indians, and were with them until the close of the 5th, and almost constantly in council.

Contrary to the general opinion, we found them intelligent, cleanly, and well behaved. Their neighboring white settlers gave them a good name. Some who had been on these borders for many years said they had never been molested in person or property by them. Upon this reservation there are a large number of whites, who have made claims thereon, and even many of these testified to the harmless conduct of the Indians. Their principal fault seems to lie in possessing lands that the white man wants.

This reservation was set aside for their use by treaty of February 22, 1855, and was guaranteed as their permanent home. By this treaty land was to be plowed and prepared for cultivation. As a sample of injustice to them we were told that the land had been plowed several miles north of their reservation, and not a foot for their use thereon. To satisfy ourselves of this, we visited the place designated (lots 1 and 2, section 13, township 44, range 28 west) and ascertained from the then occupant, a very

respectable citizen by the name of Dinwiddie, that his farm embraced the improvement mentioned, which had been made before he purchased.

By the treaty of March 11, 1863, this reservation was ceded to the United States, but by a proviso in article 12 it was stipulated—

That owing to the heretofore good conduct of the Mille Lac Indians they shall not be compelled to remove so long as they shall not in any way interfere with or in any manner molest the persons or property of the whites.

By article 4 of same treaty it was agreed that the United States should clear and stump and grub and break for the Mille Lac band, upon said reservation, 70 acres of land, which confirmed the belief that they were not only permanently located, but had the sole occupancy of the reservation.

In the treaty of May 7, 1864, which was intended to supersede the one last alluded to, article 4 makes the same stipulation as to the breaking of 70 acres of land, and by article 12 a promise as to their living thereon, the same as provided by the treaty of March 11, 1863.

The Interior Department now holds that—

The Mille Lac Indians have never forfeited their right to occupancy and still reside on the reservation.

But, notwithstanding this, white men have been permitted to rob them of their pine, and for years to settle upon their agricultural lands, and there to remain in quiet possession to this day to the great injury and fear of the Indians. Some of the whites had the shameless audacity to take from the Indians land the latter had, with much labor and perseverance, put into cultivation. Squatters are now settling upon this reservation, and the interest of the Indians ignored.

There are many persons upon the Mille Lac Reservation who went there believing that they had a right so to do. They were induced to believe so by the action of persons who not only sought the rich pine forests thereon, but actually secured, as is believed, patents to many acres thereof. It is possible matters can be so arranged as to give in some way protection to the well intentioned but misled whites who have made homes upon this tract; but be that as it may, the question of right should be settled at the earliest possible moment, for the greater the delay the more difficult will be its adjustment.

All present assented to the agreement and signed the same.

One council was held at Grand Marais, with a part of the Grand Portage band, October 20. These Indians accompanied the Commission to Grand Portage, where councils were held October 23, 24, and 25. At these councils the Indians gave very marked attention, and at the last council expressed themselves as fully understanding and fully satisfied with the terms of the act, and signed the article of agreement with much cheerfulness and unanimity. These Indians complain that white fishermen spread so many large nets near their reservation that the Indians are unable to procure a supply of fish for food.

Bois Forte and Vermillion councils were held November 9, 10, 11, and 12.

At the first council the Indians seemed timid and distrustful. Indeed, the Vermilion Lake and Net Lake parties seemed to distrust each other, and declined to enter into the discussion of the subject presented to them. Subsequently better councils prevailed, and the Indians announced that they should hereafter act as a unit. From this time the discussion was entered into with freedom and cheerfulness, and finally resulted in their "touching the pen" with great solemnity and much formality.

These Indians have the best hunting grounds of any of the Chippewa bands; there being contiguous to them an immense tract of timber land over which the white man seldom passes. They seem willing to learn to till the soil, but ask for better facilities. When asked how they cultivated their potatoes, these men of the North say they drove a stake into the ground and pried up the earth, and then made it fine with their hands. Much of the lands on the Lake Superior Reservations is unfit for cultivation. And it is believed that if representatives from these bands can visit White Earth, many of them will cheerfully remove there. The Bois Forte Indians complain that they have been despoiled of a large amount of timber cut from their reservation, which is run down Little Fork River to the British possessions. We promised to call the attention of the Department to this.

At Fond du Lac the first council was held November 18, and continued daily until and including November 21.

It will be seen by the proceedings that Nah-gah-nub, the head chief, did much of the talking. He is a very old man and not in his prime, physically or mentally, but is respected by all. Many of his band for want of work (the cutting of timber on this reservation having been suspended by order of the Department) are in great danger of suffering during this winter and coming spring. Heretofore, while permitted to cut timber, they were well to do and contented.

Like all of the Mississippi bands, they feel greatly grieved at the long continued withholding of the money due them from the Government. Our positive assertions that justice should speedily be done, not only in this respect, but in the matter of a palpable error in the boundary lines of their reservation, induced them to listen attentively to the propositions submitted, and all touched the pen.

By the fourth article of treaty at La Pointe, September 30, 1854, it is stipulated, that the Fond du Lac Reservation shall embrace the following boundaries:

Beginning at an island in the St. Louis River, above Knife Portage, called by the Indians Paw-paw-sco-me-me-tig, running thence west to the boundary line heretofore described, thence north along said boundary line to the mouth of Savannah River, thence down the St. Louis River to the place of the beginning. And if said tract shall contain less than 100,000 acres, a strip of land shall be added on the south side thereof large enough to equal such deficiency.

Whoever was sent to make a survey of this reservation followed the last clause of the article, and by his survey limited the area to 92,346 acres, the north end of his survey line on the west not reaching within 12 miles of the mouth of the Savannah River, thus defrauding these Indians of over 100,000 acres, which lands were put into the market and long ago disposed of by the United States; and for over a quarter of a century this injustice has been permitted to exist, a festering and deep-seated cause of complaint against the Government. The Indians at the time of the making of the treaty had the boundary lines definitely fixed, by natural lines to them unmistakable. They knew no more about acres than they did of the mariner's compass.

We had no hesitation in promising that the Government would speedily remedy this grave error.

As the various bands decided to take their allotments on their respective reservations, and have constructively done so, we told them that the \$90,000 to be advanced and already appropriated would be paid pro rata, as soon after the approval of these negotiations by the President as should be practicable, but not later than the coming spring. The amount will be so small to be paid to each individual that it is not probable that any will elect to

receive anything but money. As they are in the most destitute condition, and as we gave them to understand that the money would be so paid, we trust neither the Indians nor the Commission will be disappointed in this.

The clause of the act of January 14, 1889, providing for the payment of the interest that may accrue on the permanent fund, was to us obscure inasmuch as it says "one half of said interest shall be annually paid in cash in equal shares to the heads of families and guardians of orphan minors for their use, and one-fourth of said interest shall during the same period and with the like exception be annually paid in cash in equal shares per capita to all other classes of said Indians," etc., and as we could neither explain this to the Indians or comprehend it so as to give it such an interpretation as would do equal justice we promised the cash payment should be made per capita in equal shares.

Wherever we went the Indians expressed a desire that the Government would set aside a sufficient quantity of land upon each reservation for Government buildings, such as may be necessary for physician, blacksmith, farmer, carpenters, and for missionaries, traders, etc. We hope this will be done, and that order, as to the location and the erection of all such buildings, will be enforced.

They also requested that upon each reservation a tract of pine land be reserved and held by the General Government, as might be necessary for their common use, and to be so held during the pleasure of the Secretary of the Interior. We earnestly commend this request.

They all earnestly plead for saw-mills, cattle, agricultural and mechanical implements, which they must have or they can make no substantial progress. They must be assisted in breaking and fencing land, building houses, and with provisions, until they can sustain themselves. They are no longer tribal Indians, but citizens at present helpless, and must be treated as such. The saw-mills are of

the utmost importance, for at present nearly all live in single-room wigwams or huts, where privacy is unknown, without or within. To return young boys and girls to such abodes who have been educated in refined and chaste society at Government schools in the East will be destructive to their morals and a loss of the expense incurred.

Although the Indians have decided to take their allotments upon their reservations, it will not be well, in many cases, they should do so, and we believe that if rightly cared for, many can be induced in the near future to remove to White Earth. For this reason it may not be prudent to urge the making of individual allotments upon other than White Earth and Red Lake Reservations at present.

According to the established custom, none but chiefs and headmen speak in council, but at various places others conferred with us by day and by night, and many as individuals expressed a desire to remove to White Earth as soon as provisions can be made for their subsistence. Their removal should be encouraged, as it will be of the greatest benefit to the Indians and to the State. It is now impracticable to make allotments upon any save the White Earth Reservations, and will be until the others shall be surveyed. All but the White Earth and a part of the Red Lake Reservation, are heavily timbered and unfit for cultivation without a heavy expenditure of money and labor, and at best can not for many years be profitably farmed; and it is doubtful, now that the game has nearly all disappeared, if for several years they can raise enough for self-support.

As 10 acres of maple timber for sugar making is a large tract for one family, they requested that, to accommodate as many as possible, 10 acres only, by legal subdivisions, should be allowed each family now occupying the same. We promised to ask that this most sensible request be granted.

As the four townships of pine land ceded to the Government, of the White Earth Reservation, have been surveyed, and as the timber is liable to be stolen or burned, the Indians desire an early estimate and sale of the same.

On some of the reservations there are swamps of valuable cedar and tamarac which can not be cultivated or sold for agricultural purposes, and the land is liable to be denuded of the timber by trespassers. The Indians request that such land be withheld from sale under the preemption laws, and that the Secretary of the Interior be authorized to cause the same to be sold in such manner and upon such terms as to him shall seem best for their interest.

It is reported and believed that upon the Grand Portage, Bois Forte, and Vermilion Reservations there are valuable mines, and that if such are discovered after examination they shall be disposed of by the Secretary of the Interior so as to best subserve the interests of the Indians. This is in accordance with their request.

A further appropriation for surveys and examination of lands will be necessary. The pine ceded is estimated by various parties to reach in value from twenty-five to fifty millions of dollars. A small appropriation can be used for the purpose of defraying the expenses of Indians from a distance who may desire or can be persuaded to visit the White Earth Reservation with the expectation of removing thereto before allotments shall be taken or confirmed elsewhere.

Provision should be made for a mill, furnishing cattle, and farming implements, etc., to enable the Red Lake Indians to commence farming and building houses the coming spring.

The head chief of the Pillagers, Flatmouth, has for several years resided in Canada, his sister, Ruth Flatmouth, is in her brother's absence the acknowledged Queen, or leader of the Pillagers; two other women of hereditary

right acted as leaders of their respective bands, and at the request of the chiefs were permitted to sign the agreements.

In taking the census, which was a tedious work, we took unusual pains to see that all rightful persons were included, and in every case not only submitted it to the chiefs and leading persons of the tribe, but secured their presence and assistance. After having explained to them the importance of accuracy, they fully and earnestly gave their best efforts to insure its correctness.

United States Agent B. P. Schuler accompanied us to each and every band within his jurisdiction, and gave us most valuable official as well as personal assistance.

Mr. A. Leahy, United States agent at Ashland, joined the commission at the Fond du Lac Reservation and rendered us material aid.

Father Aloysius, O. S. B., was with us at Red Lake, White Earth, and Leech Lake, and at all times used his influence in the interest of our work.

In no instance did we encounter opposition from the traders or white men, husbands of Indian women; on the contrary all readily gave such assistance as they could. We feel warranted in saying that there was not an Indian who was not fully informed of the purport of our mission, and that the assent of all would have been obtained had authority been given us to put in the way of adjustment unsettled claims.

In the expenditures incident to the long distance traveled, the length of time consumed, the number of Indians we were compelled to subsist, and the large force we had to employ as messengers in taking the census and aiding in securing the signatures of such only as were authorized to sign the agreements, and making in duplicate said agreements, and in triplicate the census rolls, we have had

constantly in view the injunction of "observing and practicing the utmost economy."

Among the Indians are many well-educated mixed-bloods, who will be of great assistance in leading the unenlightened onward.

In Michigan, Wisconsin, and elsewhere we know there are persons of Chippewa blood that will claim, and no doubt many are entitled to, the benefits under the recent negotiations, who were, from their higher education and associations, forced to separate from their bands and seek a living and more congenial society elsewhere, who, now that they can hold lands in severalty and come under the protection of the law, will return to their old homes; for such consideration should be given hereafter. We think, however, that the safe rule to be observed will be to consult the chiefs and head men as to the justice of their claims.

To enable the Indians to commence their new life in such a way as will, *without loss of time*, encourage them to follow all industrial pursuits possible, it is evident a sum should be advanced by the Government sufficient to enable them, with their labor, to put as much land under cultivation and build as many homes as practicable. At each and every place, either in open council or in private consultation, they were urgent in requesting such aids as are indispensable to white men. Especially, all not pagans expressed a decided preference for mission schools, deeming it essential that the morals of their children, as well as their education, should receive careful attention.

If this shall be done and the Indians are properly guided, the most happy results may be expected to follow.

Give the Indian justice, kind and patient treatment, and his confidence can be gained, and by a wise hand he can be started on the road to a useful life. He is naturally trustful, with strong attachments for those he believes to

be his friends. To his enemies and to those he distrusts, a different nature will be unmistakably visible.

In carrying out this new departure, many details must be considered. Of the final result of this most beneficent measure, properly put into execution, there can not be a doubt.

Respectfully,

HENRY M. RICE.
MARTIN MARTY.
JOSEPH B. WHITING.

Hon. T. J. MORGAN,
*Commissioner of Indian Affairs,
Interior Department, Washington, D. C.*

*Schedule showing the number of acres in the
Chippewa reservations in the State of Minnesota.*

Bois Fort	107,509
Deer Creek	23,040
Fond du Lac	92,346
Grand Portage	51,840
Leech Lake	94,440
Mille Lac	61,014
Red Lake and Pembina bands	3,200,000
Vermillion Lake	1,080
White Earth	796,672
Winnebagoishish, Cass Lake, and White Oak Point	329,000
Total	4,747,931

Name of band	Number in each band				Number assenting
	Adult males	Adult females	Minors	Total	
Red Lake and Pembina Chippewas	386	422	578	1,386	324
Mississippi Chippewas	934	854	1,414	3,002	688
Pillager and Lake Winnebagoshish	600	649	959	2,208	466
Grand Portage Chippewas	73	85	136	294	72
Bois Forte Chippewas	228	224	291	743	211
Fond du Lac Chippewas	157	187	327	671	123
Total	2,178			8,304	1,884

* * * *

FIRST COUNCIL AT LEECH LAKE.

AUGUST 8, 1889.

Mr. RICE. After the lapse of many years, it is pleasant to return and meet so many of you here. It, however, makes me sad to miss so many faces that I saw long, long ago, but those who have been called by the Master of Life to the spirit land have left their representative behind. In dealing with you, I can not but think that your fathers or their spirits are present, and if the result of our negotiations shall be as pleasant as those had with your fathers, I shall leave here with a light heart. We may not have brought as much sunshine as we or you would desire, but we hope that we have brought something which will clear away the clouds that have hung over you so long.

The business upon which we have come is of the utmost importance. It is of more importance to you than any business you have ever transacted. It is not so much for the present as for the long future. It will require your best attention, your best thought, and the aid of your wisest men. We do not expect that you will all be of one mind;

you will at first differ very materially among yourselves, but by discussion and comparison of views, some of you will perhaps see the matter differently than at first. All we want now is your earnest consideration, and we will give you all the time that is necessary for consultation. We shall not hurry you. We wish you to bear in mind particularly that whatever your answer may be, if it is given in the spirit of friendship, it will be satisfactory to us. We shall leave the decision entirely to you and will be satisfied with it, hoping that it will be for the best.

We have thought perhaps you might desire another interpreter—one who is more intimate and familiar with you than the one we have brought—and if so, you may have one. So far as in our power we will gratify you in everything that is right which you demand. We will wait a moment before proceeding with the business before us, for you to determine whether or not you will select another interpreter. If you do not desire to name another we will proceed with the reading of the act, and at the next session, if you desire another one, all you will have to do is to say so.

Colonel Whiting will now read the act to you.

Commissioner WHITING. Friends, although I am a stranger to you, I beg you to accept my kindly greeting. The chairman of the commission directs me to read to you the law under which we proceed.

Commissioner Whiting then read the act of Congress, it being carefully interpreted, phrase by phrase, by the interpreter.

MR. RICK. You have heard the act read, and we wish to know whether you have anything to say in reply. If not, we will fix upon an hour to which we will adjourn.

If you are ready this afternoon we will give you an explanation of the act; the council now stands adjourned until 2 o'clock.

(Upon the announcement of the adjournment, Ruth Flat Mouth, the only representative on the reservation of the family of the celebrated chief, Flat Mouth, and the only woman present at the council, where she sat at the head of a line of chiefs, arose and greeted the commissioners by shaking hands with them, she being followed in order of precedence by the chiefs.)

The opening of the council in the afternoon was delayed by a council which was being held by the Indians. Kay-gway-je-way-be-nung appearing before the commissioners and announcing to the Indians present, that those in the council outside did not wish those in the council inside to say anything until the outside council was finished.

O-ge-mah remarked to the Indians then present in the council, that it was not the custom among the whites to make any reply during negotiations until everything said by the other side was understood, when an intelligent response could be made, and that he recommended that procedure.

The Indians who had been in council elsewhere, came in half an hour later, when the council was called to order.

Mr. RICE. If you are ready, I will now endeavor to explain to you the provisions of the act. If you are not ready we will postpone it until you are.

I do not expect that all the explanations to-day will be fully understood, but we will hereafter answer all questions you may ask about them.

After fully explaining the act, the chairman ended by saying: As you probably wish to talk over many matters among yourselves, we will adjourn, and hope that you will be ready to meet us again at 9 o'clock to-morrow morning. Should anything occur to prevent our meeting at that hour, we wish you would let us know so that we shall not be disappointed.

Council then adjourned.

SECOND COUNCIL AT LEECH LAKE

AUGUST 9, 1889.

The council was held out of doors, there being no room large enough

STURGEON MAN. My friends, I wish to say a few words to you. I shall tell you what the feelings of the Pillagers are when they meet you. As soon as the Pillagers had made up their minds what to do, I took some of my money and I went and called upon you. It is not my purpose to charge the Pillagers anything for my services, nor for what I expended in their behalf. We wish an Indian to stand by and listen—an Indian interpreter.

Mr. RICE. Name your man.

STURGEON MAN. Those men will select one.

John Bassett (Way-me-te-gozh) and Charles Martin (Maysh-kow-e-gah-bow) took seats in front as interpreters.

STURGEON MAN. You see these boys are full-blooded Indians, and we wish to have them listen to what is said.

Mr. RICE. That is right. The council is now open for business.

PAUL H. BEAULIEU. I think it is expected that the Commission will speak first.

Mr. RICE. In the council yesterday we endeavored to explain to you the nature of the act. If there are any further explanations desired we will give them with pleasure.

We wish to say that the President directed us to take down whatever you may have to communicate to him, and all we may say or you may say will be put in writing and sent direct to your Great Father. We know that there are some matters which will develop as we proceed, upon which you will wish information, and so far as we can we are ready to give it.

NO-DIN-AH-QUUN. I do not wish to say anything definite in what I say. We are waiting for the time when our braves and young men will allow us to proceed to this business—to talk to you. It is our sincere wish that you should once more explain the paper that you have before you, so that every one who is here present may understand. We wish it set forth so plainly that no one can misunderstand. The reason we do not give you an answer at the present time is that we want more light on the subject so we may discuss it intelligently among ourselves. That is why we want the explanations made, and made so explicitly that we will understand. After you get through the explanations we wish that you should tell us that that is all you have to say for the present.

Mr. Rice again explained the act in detail.

MAY-COD-AY-WE-CO NOY-AY. I want to know if that is all the message that you have to give us?

Mr. RICE. The whole of the message was read yesterday. I have only made explanations. We are prepared to give explanations of any other points that may come up as we go along.

MAY-COD-AY-WE-CO-NOY-AY. I am a priest, and I wish to talk to my friends. It is not necessary for me to come forward and shake hands. I wish to have a little rest for to-day.

Mr. RICE (to the interpreter). That is, they wish to adjourn?

Mr. BEAULIEU. Yes, sir.

Mr. RICE. The council is now adjourned until tomorrow morning at 9 o'clock.

THIRD COUNCIL AT LEECH LAKE.

AUGUST 10, 1989.

This council was held in the open air.

Mr. RICE. The President instructed us to treat with you kindly but firmly; to treat with you openly, not secretly. This is referred to to show you that the signature of no Indian will be taken in the woods, behind the houses, or in the dark. Whoever signs this paper must do it openly and before you all. None but a coward would do otherwise, so you need not be afraid: whatever is done must be done here in daylight, where all can see and all can hear. I wish now to have you rest assured upon this subject. We have not come here to disgrace our Great Father or ourselves. Every word you say will be taken down and given to him. We have not come here to beg you to sign, or to bribe you to sign. Your Great Father has made you an offer, and it is optional with you, after you understand its terms, as to whether you accept or not. It makes no difference to us as to whether you do or do not accept it. You are the ones to suffer, not we.

You sent him word three years ago, many of you, that you did not want to leave this place. He listened to you, and has consented to your remaining. I know all about it as the papers are here before me. Your Great Father knows well your condition. He knows how very poor you are: that you have no mill; that there are many other things you are in need of, and that you have not even boards to make a coffin in which to bury the dead. He knows as well as we do that many of your young men can not get work. He knows that you are driven to the woods to dig snake-root to sell, in order to live. You know it; your old men know it; your young men know it, and you know it.

Now, I do not know of anything more that we can do until we hear from you. If you do not see fit to talk, all there is left for us to do is to pack up and leave.

MAY-COD-AY-WE-CO-NOY-AY. I am coming to tell these chiefs something. I shall point out to them the persons whom we wish to appoint our spokesmen, and who will speak to you the words that we put in their mouths. That is what the braves here of the Pillager band say, and our young men also.

Ah-zhow-we-ge-shig will be the first speaker of the chiefs, and Wob-on-a-quay will also speak. That is the plan adopted by all the braves present. That is the organization as now formed. There are a few of the braves that are selected from their bands who will speak after the chiefs have spoken. Mah-je-gah-bow will be the first one to speak after the chiefs, and after him, two young men will speak in behalf of the young men, and after that May-dway-we-nind will speak. The Sturgeon Man will speak. The Sturgeon Man is the one who will speak the minds of the Pillager Indians.

AH-ZHOW-WE-GE-SHIG. You have heard speak the man who was selected to make the speech to you. And as I have been selected as the first speaker, the task is a very difficult one and a complicated one for me to begin. If you feel an anxiety relative to this, it is the same anxiety I feel. Now, if you may be pleased to allow us, we will go and sit around and discuss the matter as to what shall be said. I think that it is just the way you ought to do.

Mr. RICE. The council now stands adjourned until 3 o'clock.

AFTERNOON SESSION.

The council was called to order by the chairman, who stated that the Commission was ready to hear the speakers who had been appointed.

AH-ZHOW-WE-GE-SHIG. I am selected by the chiefs, those that you see before you here, by the braves, and also by the young men of the tribe. The chiefs from Pine Point, on the White Earth Reservation; the chiefs of Cass Lake and Lake Winnebagoish Reservations, and their

braves, have also selected me for the first speaker. They are here as participants, because they are interested in the entry, as it were, of these affairs. In the course of these negotiations you shall hear that they have a perfect right to participate. As I have been selected I shall endeavor to do my duty.

My friend (addressing Mr. Rice), I represent all these people, when I say that I am very much pleased to have heard your talk relative to my ancestors, and the faces you have missed here; all that has been a source of great pleasure to me, that you should be the only one left of the old-time friends.

My friend, the reason we are all happy to have the pleasure of addressing you is that you are aware that these chiefs and these braves were in the past; you have heard of their prowess in war and how they have conducted themselves in dealing with their enemies. For those reasons they feel like men. Everything that they used to take glory in—in warring with their enemies. Everything of that kind, however, is now buried underground, and our record is clean of any crime.

We know that you have been selected by the President of the United States, and also by the law-makers of your country, to come here and conduct these negotiations. So you see, my friend, that you have been selected on the part of the Government, and I have been selected to appear before you on the part of the Indians. This must all be done with great respect towards each other on account of those we represent.

I now wish to say a few words regarding those you were kind enough to refer to in your opening speech and in relation to the road they followed and the land they tracked. We are now in the position in which we can meet each other. That is why the chiefs and braves and young men feel so joyous to-day in having the pleasure of meeting you. My friend, the great pleasure it is to see

you meet us right on our own reservation, to see you present among us, makes us feel as though you were right in the palm of our hand. I state all these matters to give you an inkling of the feeling in our minds. I shall now follow a topic that pertains not only to the chiefs, but to the tribe in general.

My friend, do not entertain the idea that you have one before you who does not understand when anything is said to him. My friend, we do not wish you to follow a track that you can not go over, but neither do we wish to get over you.

My task is ended—that is what the chiefs, the braves, and the young men told me to say. You should consider me as a pioneer who is making a road, or laying one out for the others to follow.

NO-TIN-NAH-QUAH-UM. I have also been selected to lay before you the wishes of these people, the whole of those here.

We have been very much pleased to see you here in our midst. Had it pleased the Master of Life to take you away from the land of the living we should have felt very sorry, and as one man, on account of the business that transpired in the past. I refer to the cessions made by the Pillager band of the Chippewas. You will very well remember the cession. This is the first thing in the minds of these people, and we wish to have an understanding in the matter. We think of it as having never been fairly understood, and we should very much like to have you inform us as to its status at the present time. We do not at all oppose the act you now lay before us for our consideration. Our Great Father is the person who employs you. The Pillagers always receive word from you, in which you say: "My friends, be very careful about your behavior; always do what the Government wishes you to do, which is to be peaceful; never incur enmity. I beg of you as friends to listen to me and do no covert act.

Some day my hands will be let loose so that I can help you." That is the word you sent us, and that is the very reason that the Pillager bands are so pleased to see you, and why they respect you—for the kindness you have shown, and for the words I have repeated.

The men you see here are in poverty, in extreme poverty. That poverty began at the time of the first cession you obtained from them. You are cognizant of all the cessions we have made, and we wish that while you are here you should try to redress any wrong committed relative to the obtaining of those cessions. The Long Prairie is the piece of land that I refer to, the river country. That is a piece of land that you borrowed from my forefathers, and the amount of money that we were to receive relative to that. We wish you to take that into consideration and see if you can not redress it.

Another thing that we wish you to strictly bear in mind is, that the Government of the United States has caused dams to be built, which have overflowed everything here that we had as a dependence for subsistence. They have destroyed all that without ever offering compensation for it. These people are all in accord in this matter. They wish to have an understanding about the Long Prairie matter, and also about the reservoir dams established, and they wish to hear from you what can be relative to that. If you can give them an encouraging answer in any of these back matters, we shall not be unfavorable to this arrangement about to be made and which lies before you.

The amount of money that would accrue if justice was done to us, and the money paid to all these families before you here, would be a great source of revenue to them. It would help alleviate their poverty and be a source of help to these young men, to these old men, and the women and the orphans. That is the nature of our negotiations to-day. The only stumbling block there is to the arrangement you now bring and lay before us is the adjustment of those old dues which now belong to us. It was said to us,

"The money shall be placed in your hands and it will help to relieve your wants." That was only a matter of speech; the thing was never carried into effect. It never came to pass.

An arrangement was made a few years ago whereby the Indians were to be well supplied with agricultural implements. I was very much elated when I heard of it; but when I saw the fulfillment of the promise, what did I see but a log-chain laid before me, which was to go around for one whole band. And then there was a yoke there also. When I looked at the yoke I thought to myself that I would not have sent a yoke without something to put under it. Come to find out, it was sent only for me to look at, and I never found out who the yoke was used on. If they had only said to me that they brought the yoke for the purpose of putting it on me and yoking me with it I should have kept it as a memento to show you this very day.

I have referred to all these back matters because when this act is now read to me, having been treated as I have—and it is no exaggeration as I have stated it—I am afraid of getting my foot into the trap again; so that I can not be too careful how I make promises hereafter.

WOB-ON-A-QUAY. My friend, now that I am about to talk to you, remember that my ancestors were your friends and what my ancestors thought of you. That is just the way that I think of you; I think of you as my greatest friend. My friend, the question that I wish to ask of you is, Here is an arrangement that you have left unsettled; why should you wish to tread over the arrangement and place a new one before it? My friend, there is a big lot of country, a big tract that you borrowed from me; I wish you to make that loan good. My friend, I do not understand the act. Do you not know that everything which grows under our feet springs anew every year? It does. There is something that is buried away underneath that ought to be taken up before beginning again.

I am old and tired, but I will depend upon my stomach feeling a little better after the big hunter (Commissioner Whiting) has shot something.

Mr. RICE. Yesterday I walked up to the old post to see the graves of my old friends, Flat Mouth and George Bonga and others, and to see again the ground upon which the first treaty was made. Sometimes in our dreams events that occurred years ago pass vividly before us. While standing there I fancied that I was again a young man, and all that happened there forty years ago this month flitted distinctly through my mind. There are some of you now before me who were present then; then you were the young men. You will well remember the words I at that time used. I said that you were not selling the land; that the price paid was inadequate. So, you see, the words of your second speaker were true.

The Great Father wanted that land for the Menomones. The Menomones in early days used to come up a few at a time and hunt and trap in your country. They were friends of yours. I was at that time merely the messenger of your Great Father. You will see to-day that it was written in the treaty that the land was to be held for Indian purposes. It was given to the Menomones. Your Great Father was sincere in it. It was expected that the Menomones would remove there, but they were told by their friends in Wisconsin that owing to the war between you and the Sioux it would be dangerous for them to do so; that they would be between two fires. After considering the matter for several years they finally concluded they would not come, but would take a smaller piece of land and remain in Wisconsin.

There came, soon after, a change of administration, and the matter was forgotten, was laid aside. You did not say anything about it. No one seemed to take any interest in it, and several years ago, at the request of Chief Flat Mouth, I wrote the facts and sent them here, that you might always have something to show what the

transaction really was. You called the subject up three years ago, before the commissioners acting at that time, and I was in hopes that the matter would be thoroughly sifted, but although I see that you allude to it in their report, they did not seem to understand the subject. But the paper I gave you was printed. It is now on file with the public documents in Washington. While I felt very sorry that the transaction terminated as it did, and was disappointed about it, I never felt ashamed, because I never told you an untruth. I have, however, lived in hopes that the matter would be settled to your entire satisfaction, and I believe that the day is not now far distant when it will be. But it stands in the same position as the old balances due to the Chippewas of the Mississippi, and it required a great deal of explanation there to make them understand the true state of affairs. At the negotiations three years ago they paid the amount to be paid for the damages caused by the reservoirs.

In looking back to the distant past it was seen that the Chippewas of the country were once one people, that you fought the Sioux from day to day, that you were a brave people, a people to be feared, and that this vast country, from Lake Superior to the Red River of the North, was taken by you from your enemies, and when I first came among you much of this region was covered with the bones of the dead. In those days whenever one band was in danger or in trouble the others were called upon, and you all helped each other. It was by your common efforts that you conquered and retained this country, and the Great Council has thought that you should all participate in the benefits when it should be sold. Those are the subjects that occupied the attention of the law-makers. The other matters were not even considered. They thought them of too small importance, and it was not the proper business of those who originated this measure to first examine into those details. So these matters were never brought as to the attention of your Great Father, but he told us in the instructions to listen attentively to every

complaint you might make, and to everything you might say, and put all down in writing and send it to him.

I am very glad to have heard what you have said in regard to those matters. I have never felt at ease—I have never thought of it that it did not make me unhappy that the old matter, in which I was the instrument of the Government, had not been closed to your satisfaction. When they commenced building the reservoirs I had that in my mind, and I wrote constantly to your people to keep quiet and to bear with the ills upon you in hopes that something would occur by which we could go back and settle up the old matters together with the new. Many of my letters are now among you; none of them are private, and they all speak in the same tone. But, my friends, the truth is this: You have been so poor that your entire attention has been given to procuring food enough to supply your daily wants, so you have not had time to give to these great questions; consequently, you have neglected them.

We would not be unwilling to make this a part of the treaty if we could; but should we do so it must go back through that long, long road—through both branches of Congress, through the Interior Department, and then back to the President, after which appropriations would have to be made, which might consume a year or two.

We have no advice to give in regard to this. We have stated to you the plain truth, the facts as they exist, and it is for your better judgment to decide what to do.

In regard to the reservoirs, you know very well that I at once wrote to Washington and did everything in my power to see nothing should be done until a satisfactory arrangement with you had been made. But in the making of public improvements no one can stop the Great Father. Only a few years ago your Great Father wished to cut a canal through the point of land at the west end of Lake Superior, at the outlet of the St. Louis

River. The whole State of Wisconsin objected because it would throw the course of that river over to this side. They took it to the highest court in the world, the Supreme Court of the United States, and that court sustained the President. It was so with the Northern Pacific Railroad. He and the Great Council determined to build a railroad to the Pacific. They ran it through the lands of the whites and through the lands of the Indians, and there was nothing which could stop it. Now, that was the case with the reservoirs. It was considered a national work, and it was determined that they should be built. All this, however, has not lessened your claim to damages, and you are just as much entitled to the amount as you would have been had you made an arrangement before the work was done. This is so plain a case I can not but think there has been some mistake or some misunderstanding or you would have been paid long ago.

I believe that it is now your wish that we should adjourn until Monday. You may, meantime, think of something that you wish to ask—your chiefs, braves, or young men—and we will patiently listen to anything that you may have to say. We wish to go away leaving you all satisfied and in a better frame of mind than we found you. When you act together your action is more effective. When we get a paper from you and know it comes from all we feel encouraged to work. All you now have to do is to respect the opinions of each other. Consult together freely, like men, and while you may differ at first you will probably agree in the end. I now pronounce the council adjourned until Monday morning at 9 o'clock.

FOURTH COUNCIL AT LEECH LAKE,

AUGUST 12, 1889.

This council was also held in the open air.

Mr. RICE. The persons you have selected to speak this morning will now be heard.

KAY-ME-WUN-USH. You have, I suppose, been informed that it is hard work for me to speak this morning. I have a few questions to ask. There were some questions asked of you yesterday. There is something different that I wish to ask you this morning.

About the cessions of which we spoke, I do not wish to refer to that. I wish to begin the subject of the reservoir dams established which have caused us so much damage. My words will be few, as there are others sitting here who will speak on the subject. We wish the commission to understand distinctly that that is the matter we wish to impress upon them, as it is doing us an enormous amount of damage. It can not be put plainer than this, which is as we understand it: There is something grows there by nature which is put in my hand. The white man takes that morsel put there for me, from my mouth. The reservoir built there has taken away my subsistence. It has created not only hard feeling, but hardships also. You [Mr. Rice] have written us to be very careful not to injure any one, or any of our property—to respect that dam property. We have done so, but we have, nevertheless, suffered from that cause. The respect which the Pillager bands owe you is the cause of our not saying anything about the dams; that is why we were not troublesome.

There is another thing that we wish to ask you. In the treaty ratified in 1855 (article 3) the old men made a stipulation in which there was a sum of money named. [Meaning the utility fund of \$4,000.]

And the Mississippi money that was put on one pile; that was used by the Chippewas of the Mississippi. We never used a cent of it.

There is another thing we wish to mention for the consideration of the honorable commissioners; it is this: That the Government of the United States, under solemn treaty, promised to pay the chiefs for their services, a surplus that came out of the annuity fund.

(This refers to the treaty proclaimed March 20, 1865, article 4.)

I do not utter these words frivolously, but wish that the greatest consideration should be paid to them. It is a matter of great interest to us; and we present it because we respect you and know that you are an honest worker for us; because you pity us, and because of the position you occupy as a representative of the Government. This is all I have to say. I will leave the matter to be discussed further by the braves and young men.

MAY-COD-AY-WE-CO-NOY-AY. I wish to say, in behalf of the band, what I was told. A man will speak who will represent the wishes of the whole tribe. We are of one mind this morning, and whatever he says will be for us all.

SONG-GE-GE-SHIG. I have an apology to make, as I am unprepared with my remarks, except in a general way, not thinking that they would call upon me. My subject will be a different one. It is the subject that you are discussing in all the Indian villages. You are aware there is such a thing as fables. Even fables, which are mythological in character, are never disputed if there is any sense in them. Even fables are listened to attentively, let alone such a matter of great importance as this.

We have great faith in the person that sends you here, and do not dispute a single word of what you utter in his name. We wish we knew positively that it comes from our Great Father's heart, what you have promulgated for the benefit of all these Indians here. My friend, we are very sorry that you should have forgotten such a momentous thing as these back arrangements, as, if they had been all settled, there would have been no necessity of discussing this at all, but we could have disposed of this new arrangement that you wish us to enter into.

This work that you are taking along from place to place with you, you can not change or modify. If it was possible I should follow (accept) it. I want to impress you with the idea that these people are all of one mind. If they make up their minds to accept the propositions they will

do so as a unit, and if they conclude not to accept it, it will as a unit be rejected. I am speaking to you so that if you do not see me over there you will know I have done what I was hired to do. I am one of the Cass Lake chiefs, but I am living here.

MAH-GE-GAH-BOW. I have been selected by the chiefs and the braves have also selected me, and the young men also selected me, our women and children selected me. My friend, it is to lay before you what engrosses our whole mind that I address you.

We heard our fathers state under what conditions they had ceded the land to you that we referred to the other day, and it is our wish that our friend should state to us what he stated to his old friends, our fathers. It was you to whom they gave the land. At the time that Flat Mouth went to Washington they laid the matter in your hands to help them make the cessions. We, the descendants of our fathers who made all those negotiations, have always said that the first time we see the friend of our fathers we shall lay before him these matters, so that he can explain to us all about it, and as to which we are so anxious. So you see, my friend, that you are the person who made this arrangement by which we consented to part with that land, and you know all about it. It was at that time, in 1855, that you drafted that treaty, and the mixed-blood now standing by you was the one who then interpreted.

There was nothing to mar our happiness here. There was no reservoir dams, and everything which is now an obstacle to our subsistence was then clear before us. That is what is putting us in extreme poverty. They think it ought to be redressed. They discuss it day after day and they are right in discussing it. Our idea, my friends, is to fix and conclude all the past relations between us. We do not wish to cover up out of sight that old matter, but to keep it in view; and after it has been fixed, then we are ready to make a new arrangement with our Great Father.

MAY-DWAY-WE-NIND. My friends, I shall now tell you the ideas of the Pillagers who have with one accord selected me to speak to you, and whatever I shall tell you you shall accept as the thoughts of all the Pillagers here. When you were selected your appointment was made strong by the person you represent, the Great Father. You are taking this message all over the country and you are bringing it to us here. The purpose is that you should carry out the intentions of the Government; that is what you are sent for. We know that in traveling you want to leave nothing behind unfinished, and we know that that is the way your instructions read. And it is a very happy thought that it should be so. The Pillagers here, with one accord, wish that the object of your mission should be fulfilled, and that the promises of the Government should be faithfully carried out. I have told you what the promises of the Government are, and I shall now tell you what our wishes are.

This matter laid before you has always been agitated in the Pillager mind during the past six years, and this is what they wish to get through before doing anything else. Six years ago we arrived at a conclusion and resolved we would adhere to it. What you have in your minds and what we have do not conflict at all, they only cross each other instead of meeting. The Pillagers have resolved that as long as these back matters remain unsettled they will stop where they are. That is where it shall stop. We have all put our names on the papers. The Indians at Cass Lake, Lake Winnebagoishish, the Indians at Pine Point, and we, have signed an agreement that we shall be a unit in the arrangement we shall arrive at. We wish that what we have asked you shall be laid before our Great Father and adjudicated before anything else takes place. We wish our business to be attended to first because it is momentous. At the present time we have extreme good feelings towards each other; so that your arrangements will be passed by, and ours will go on to Washington.

The first thing in the minds of the Pillagers is the land that you borrowed from us; this is what we are always talking about; and then the stipulations of the treaty that has been made with us; the first cession made to you, that remains in some degree unfulfilled. And the damages by the reservoirs, that is another thing.

Another thing is, that we wish you to understand that whoever touches the pen here will touch the pen under water. That is the conclusion we have arrived at. We do not wish to hurt each other, but we wish to have our ideas enforced, so that any one who shall touch the pen clandestinely we will try by our laws and punish.

STURGEON MAN (after addressing the Indians). It is three years since I took a document and placed it in the hands of our friend here, and he told me that those high in position should consider it. Mr. Sabin is the man referred to. He was pointed out to us, and we were told to lay the matter before him and that he would attend to it for us. That man told us how to proceed. Then we were told, "You should manage this matter in a proper way; if you employ any one, you have a right to pay him." We did then employ a person who knew very well how to write. We employed J. B. Bottineau for that purpose. After Bottineau had written the article for us, he came and submitted it to us. That article contained all our grievances which we wished to submit the Government. We told Bottineau that if he achieved what we so much wished, when we received the money we would pay him \$5,000 out of the fund. So you see that Bottineau was acting for us in all our business. We were also very anxious that you should be with us until all the matters were adjusted. It is very true that we have always looked to you in trouble, and you have never failed to give us succor. But you see it is impossible for us to ignore Bottineau. We have made bargain with him, so that he can not be thrown aside. It is impossible to throw off a person after you have hired him as an attorney. It is just

like you hiring this secretary; we have no business to say that you must not hire him, and that is the way we feel about the man we have hired.

At the time, my friend, that you borrowed that land from the Pillagers, who were our fathers? It may be that I was not born then, but I have heard all about it. It was this year forty-two years ago since you entered into that agreement with our fathers. That is the first thing.

It is going on thirty-five years that the other cession was made, in which the old men here ceded the other land to the Government. The arrangement made for thirty years is now passed by, and that was the number of years for which the Pillagers were to receive payment for the land they ceded.

Twenty-two years ago there was an arrangement made by which the Pillagers should receive pay, extending their annuities ten years longer than the time stipulated in the treaty. Those two men who were there at Washington at the time stated that the land on the other side here [indicating] was given back to the Pillager bands.

At the time of the raid which the Mississippi Indians got up against the Government there was a sum of money, \$16,000, which was taken from us and paid on account of the depredations committed in that raid, when we had nothing to do with it. It was none of our getting up; only a few of our men as individuals joined in; yet we had to pay that claim. It was none of our business at all to pay it. There are these men before you now who protested against joining the Mississippi Indians when they were ready to commit overt acts against the Government. At the time the White Earth Reservation was set aside, and the Mississippi Indians removed there, there was a sum of \$25,000 appropriated to pay for it, giving the Otter Tail Pillagers a right on the White Earth Reservation. We think that that land which was paid for at that time belongs to the Otter Tail Indians. We wish to

have the Otter Tail Indians here with us to participate in interest with whatever might accrue to the Pillager Indians. We wish them to stand with us in all business matters. The Otter Tail Indians ought to have land separate for themselves.

At the time of the cession, in 1855, the chiefs who made this cession did not do it for the purpose of excluding the Otter Tails. If they had only mentioned the matter to you, my friend [meaning Mr. Rice], you would have told them what to do.

We think that as our friend the agent is now here, it will be a happy moment to refer to the agency matters which have troubled us in the past.

My friend [addressing Mr. Rice], you did not think at the time that you gave us this paper I now hand you that you should ever be a commissioner to come among us. It was written nine years ago for the purpose of aiding the redress of our grievances. Please read this paper, which I suppose you gave us that in case anything should happen to you the Pillagers could exhibit this to show how the matter really stood. We wish to keep that as a memento.

The paper handed Mr. Rice read as follows:

ST. PAUL, *October 4, 1880.*

The following statement is made at the request of Flat Mouth, chief of the Pillager Indians.

In 1847, when the Pillager Indians, by treaty, sold to the United States the Leaf River country, for a nominal consideration, it was understood that the country ceded had been selected for the future residence of the Menomonee Indians, who were friendly to the Chippewas, and the country would remain Indian Territory. Not only this, but the Menomonies would form a barrier between the Pillager and Sioux Indians, who had for centuries been

at war. The old men thought by having the region thus occupied peace would follow; hence their consent to yield to the request of the Government.

They were sadly disappointed, for after the ratification of the treaty, other provisions were made for the Menomones. The Leaf River country was thrown open, to settlement, the game driven out, and the Pillagers exposed to all the evils that beset a frontier border. The country ceded contains about 1,000,000 acres; the price paid about 1½ cents per acre. The sale was positive. The Pillagers have no legal claim to the land, but morally have a claim upon the Government, which claim I hope may at some suitable time be acknowledged by giving to this poor band such aid as will improve its condition.

HENRY M. RICE,
One of the Commissioners.

Mr. RICE. In regard to the land that you loaned your Great Father forty-two years ago, all that you have said is true. It was understood between Flat Mouth and myself that that land was not to be used by the whites, but that it was for the use of the Menomones. In 1855, when Flat Mouth went to Washington and made the last treaty, the question had not been decided—that the Great Father would sell the land to the whites—consequently nothing to prevent it was done. Time passed on and the matter seemed forgotten. As I was the only one living who knew anything about it, and for fear that I might be taken away, that paper which has just been handed to me was given to Flat Mouth. And I believe I am the only white man living whose hand touched the pen to the paper authorizing the cession. The commissioner who was with me died long ago, and I do not know that there is a witness connected with that paper who is now living. So I am left alone to receive all the blame that attaches to it, but I know that I am in the hands of my friends.

It was not long after Flat Mouth was in Washington that there came a change in the administration, and then, or soon after, came the great war, when everything else was laid aside, and it has taken nearly all the time since to settle questions that were raised by the war; paying the great debt incurred, taking care of the four million blacks who were thrown upon our hands; of the widows and orphans of the soldiers killed in battle, and of the soldiers who were wounded during the war.

You can also imagine the business your Great Father had on hand when a million men were under arms and every ship we had was armed and at sea. It is as if the storm was but just over and the ship had just arrived safely at anchor. These matters, with the other pressing business of the Government, have taken up all its time, and it is no surprise that many matters of small importance to your Great Father, but of great importance to you, should have been laid aside or overlooked.

In regard to the reservoirs, your Great Father has not said that he did not owe you damages. He has sent two commissioners here to consult with you and ascertain the amount that shall be paid. The commission of three years ago also took the matter into consideration.

It was said by one of your speakers that you wished us to do nothing here, but to pass on to the next band, and it may be better to make no arrangement here, but to go home, because it would not look well if we left behind us a stream unbridged. In regard to many other matters, some of which Sturgeon Man has referred to, as to the non-fulfillment of the treaties, we can not give you an answer without first examining into the question. But these are matters which are properly brought before your agent, who has the books showing the money paid and the cattle furnished. I know you brought these matters before your former agents, and that, as it were, your words were blown away by the wind. The reason was

that they did not understand business matters, but you now have an agent who does, and who will see justice done.

We have learned since coming here that in the treaty ratified in 1865 was a provision that 200 acres of new land should be plowed and fenced for you, but instead of fulfilling that promise your then agent plowed your old land and took your money to pay for it, but did not plow an acre of new land.

In regard to the reservoirs, it has not been considered good policy to pay you the damages until it was known where you were to have homes. The sum agreed upon three years ago—\$100,000—was so large that the Government did not think it wise to distribute it in one payment, as it would soon be gone. It could not be expended here in breaking land or building houses, because if the other treaty was ratified the improvements would be lost. You can see very readily that the Great Father could do nothing while the other treaty was pending.

As you know, there are many who wish to have the treaty of three years ago ratified, and in that case the only home you would have would be White Earth. The Great Council has not acted upon that treaty, as it went to a committee, and there it lies. After your protests against it were received in Washington the Great Council devised the offer we bring you, hoping you would like it better. As I explained to you the other day how the two differ, I presume you understand it. If you had kept quiet here and expressed yourselves as satisfied with the former treaty, it might have been ratified. While the Indians of other reservations also opposed it, none did so strongly as your band, and you were the first to make your wishes known at Washington. So far as they knew your wishes, your friends have endeavored to carry them out by providing in this new agreement that you may remain here in peace or go to White Earth, as you prefer.

We shall do nothing to break the chain that binds you together in your views of this proposition, for there is nothing looks so badly as people, either whites or Indians, who are all tails and no heads. We have opened our hearts to you, leaving the result with you, and your decision will be final. We have our opinion as to what is best, but no two or three men can decide for a band. The interests at stake are your interests, not ours, and we hope that whatever you do will be for the best. We have made no promises, and given you no advice save to keep together.

STURGEON MAN. You will now hear from me, not only my voice but that of the whole people. My friends, it is now three years since we began talking of this matter, and we have done so even up to this day, and there are many days in three years. We think the Great Father is owing us too much, and you know very well there is something owing us from the Government. We do not wish to leave this Leech Lake Reservation, and we tell you this in good faith.

We do not wish our Great Father to run us into debt on account of anything relating to our reservation. We know that any one who came to us with the money in his hand, saying, "Here is the value of the land," would simply be coveting the pines on the reservation. If he wanted a certain quantity of pine and had the money, he could buy it of us. If we should negotiate with you in accordance with your expectations and accept the terms of the act, we should have to wait a long time—perhaps fifty years—when maybe all the past dues would be covered up and could not be unearthed again. [Addressing the Indians.] The braves and the young men all like the chiefs, and do not wish that any of the chiefs should do otherwise than they do. These are my ideas, and I know they are yours. If we should be at this a thousand days, I should not say different than I do now.

[Turning to the Indian agent.] The people will talk to you about the agency matters, maybe this afternoon. I don't know what time. I am very much pleased with what Mr. Rice says relative to the knowledge you possess.

Mr. RICE. It is dinner time, and we have nothing more to say. It is for you to say whether you wish to see us again. If so, you must name the hour.

MAH-GE-GAH-BOW. If we think of anything else we will let you know this afternoon.

Mr. RICE. I suppose that if you do not think of anything else we will prepare to go home.

Indians grunt assent.

MAH-GE-GAH-BOW. At what time will you meet us?

Mr. RICE. It is for you to say.

MAH-GE-GAH-BOW. Three o'clock.

Mr. RICE. The council stands adjourned until 3 o'clock.

AFTERNOON SESSION.

NOW-WE-GE-SHIG (addressing Mr. Rice). My friend, we have met again. I have heard that since coming here you have been presented with a magnificent beaded sack, and a beaded sack never goes without a pipe. [Handing Mr. Rice a handsome inlaid stone pipe.]

Mr. RICE. Thank you.

MAY-DWAY-WE-NIND. I wish to state to you what the honorable Commissioner of Indian affairs stated when I paid a visit to Washington winter before last. I do this on account of the White Earth people, who even at this day are talking of this matter. I asked the Commissioner about the matter, and he told me that the Pillagers here and the Indians of Cass Lake and Lake Winnebagoish owned that in common [pointing to the west]. The hon-

orable Commissioner had a book in his hand, and, while talking, he stretched out papers referring to this land which was owned in common. He told me that it was seventeen years ago that that paper was made operative. When I asked the Commissioner who made that paper effective, he replied that it was the President of the United States who had done so, and that there was no power on earth who could annul that paper. That is all I have to say.

STURGEON MAN. My friend, I have a few words more relative to what all the Indians wish you to do for them. Whatever you say to us, or we say to you, that man puts down on paper, and it is our wish that you may be pleased to have a copy of that left here with us, a copy of the journal.

My friend, for fifteen years past you have always told us to be quiet, to live in peace and harmony, and we have listened to your words. You told us that all which troubles and aggravates and is a source of trouble to us will some of these days be redressed. You told us, my friend, that your hands were tied, but that they would some time be let loose, when you could do something for your friends, the Pillagers. Now that we see that your hands are not tied, we expect you to make use of the executive power of the Government. We always have thought that if any one came and tried to scold us we would look to you. This has been the drift of our conversation for two days past we; we have shown the respect for and the confidence we have in you. We have thought that the only proper way was to have this matter that troubles us go back to the great lawmakers in Congress. We thought so because of your counsel that we should remain quiet and live in peace and harmony, and we thought we would have a redress there. We are now very much pleased that you are in power, so we can talk with you. We know very well, our friend, that every-

body in the country knows you by reputation and talks always very highly of you; and it is so to-day, and you are thought of a good deal above other men.

My friend, this is not your personal affair, your asking for your land; it is something started in Congress, by which you were appointed.

(Addressing the agent.) I have a few words to say to you, and hope you will listen. Of course, it is not your fault if you can not redress our wrongs when we wish to go to Washington about the treaty of thirty-five years ago. The lawmakers would perhaps be against it if they had set the sum aside for that purpose. There is a man over there [pointing to the agency office] who has charge at the present time of the annuities.

Commissioner WHITING. That is a matter for the agent to attend to.

Agent SHULER. I will have a meeting with you after the council is over on this subject.

STURGEON MAN. The way we are treated here everything goes wrong.

Mr. RICE. That may all be, but the place to talk to the agent is in his office, not here. We are here on business.

Agent SHULER. I wil' see you before I go away.

STURGEON MAN. That is what ought to have been said before. We understood that this should be said to the agent in the presence of the commissioners. That is all we have to say.

Mr. RICE. Something has been said here about your employing an attorney, and I wish to say that you have a right to employ one to write letters for you; but whoever employs him must pay him, unless he will work for nothing. If one of you commits a crime and gets in prison,

you have a right to employ an attorney to appear in court. If you should employ one and send him to Washington, to Congress, he would not be permitted inside the doors. If you should employ an attorney to speak to us here, we would not listen to him. If you should employ an attorney to speak to the agent, he would not listen to him. The employment of an attorney by two or three or half a dozen does not bind the tribe, as they can not take your money to pay him without your full consent and the indorsement of the agent. I have acted as attorney for Indians when they were in St. Paul, but I never charged them for it. I mention this that you may not misunderstand the matter.

I heard something said this morning about selling your pine to white men who might come to you for the purpose. I wish to say to you that you can not sell even a dead tree that has blown down. If a white man should be fool enough to pay you money for a tree, the first time he put an ax into it he would be seized, taken to St. Paul, and punished. A few years ago a foolish white man purchased some pine on the Lake of the Woods, and the moment he went there he was arrested, taken down to St. Paul, and imprisoned, and begged assistance of me.

Another thing regarding your pines. The white man has no right to set fire to his own house, and if he does he is punished. Your Great Father will not see his children among the white people destroy their property by fire. He does not permit it, and he will not permit the burning of your pines. It is the property which the Great Spirit put here for the purposes of man, and it is not going to be left to destruction.

I heard here this morning something that sounded like a threat. I have to tell you that times have changed. Only a few years ago an Indian was permitted to kill an Indian, and if one did so it was settled among yourselves. But

now, if an Indian kills an Indian he is just as sure to be hung as if he killed a white man.

The day before we reached Red Lake one Indian there killed another. He claimed it was an accident, and perhaps it was, but the agent seized him and he now languishes in prison in St. Paul. Congress has passed laws upon this subject, as well as upon others, of which you have not heard.

As we have said to you, we hope you will be united, and we still hope so, but we want to say to you that any man who wishes to sign this paper will have permission to do so. We shall present it, and if any one signs, it will be in broad daylight, and he will not be deterred from it.

If you have any good reason for not signing the paper, any reason that should receive consideration, we will listen and take your words to your Great Father, but we will not carry any trivial message. We are not men of that kind and were not sent for that purpose. I was in hopes it would not be necessary to say these things to you, but we have to be plain with you, whether or not it is acceptable, for we know that in the end it will be for your good.

You have much to say about the lending of land to your Great Father, but I have not heard a word about his lending you \$90,000 a year, year after year, to enable you to avoid digging snake-root in order to live.

Now, if any of you have good reasons for not signing, we will hear them, and if any wish to sign, they may do so, but no threats can be used or put in force here.

MAY-COD-AY-WE-CO-NOY-AY. My friends, I wish to tell you how we look upon your message here. My friends, it pleased the Pillagers when they heard that you had been selected to sit here and have the Pillagers standing before you. This was because of your past transactions with the Pillagers that they were so elated when they heard of your

appointment. You can see, my friends, what pains we took to receive you on your arrival, and the reception we gave you, which was done in the fullness of our hearts.

The idea of the Pillagers to-day is that they do not want to step over the old arrangements before they enter upon another. We thought you would lay before us everything pertaining to those matters. If you had done as you ought to have done relative to the Pillagers, they would not have been compelled to beg for a living to-day. I have told you why the Pillagers were so glad to see you, and they are still glad to see you. The people here were not so much pleased with the act that you read and explained to them. It was not that; it was the back arrangement that they were so much pleased about.

My friends, do you feel badly because we do not accept the propositions that you have extended to us. My friends, your friends here salute you from the bottom of their hearts, as you can see by the demonstration made when you arrived.

STURGEON MAN. I have a few words to say to you. The words you have spoken to the Pillagers here have been well listened to by your friends and those who call you friends. We do not say "friends" for the sound only, but we mean what we say.

If my own brother should come to me and wish me to enter into an arrangement, and I should not comply with his request, I should not feel insulted. Even if he should cut my body into pieces I should not resent it at all. I am interpreting the ideas of the people here, and I would not, under any circumstances, be guilty of disrespect towards you, whatever words may come from you. I am told, if any one talks hard to you, do not talk back in the same spirit; that is what they told me. The Pillagers told me, "Just think of God whenever your temper rises, and it will not rise." "If you should meet with reverses in

making your arrangements, do not let that irritate you at all; if you should be knocked down in trying to maintain your rights, do not resent it." If they keep putting these words into my mouth, I have to utter them, whatever the consequences may be. I am chosen by them to speak, I must do so.

Kay-gway-je-way-be-nung then addressed the Indians, telling them to watch any one who was guilty of touching the pen, and to stop him, and that he still occupied that attitude.

Mr. RICE. You seem to be laboring under a false impression, which I wish to correct. We do not expect any here will say anything to offend us; we certainly will not say anything to offend you. We have heard what you have said about the old matters and have put it all down.

What we expect is, that if there is anything in this paper we have brought to you which you do not like you will say so. This paper says that you may remain here. If you do not want to remain here, we wish you to say so. If you do not wish your Great Father to lend you money, say so. If you do not wish the other Indians to put in what they have against yours, say so. As we have talked so long about the other matters, we desire to speak of this a little, and if there is any alteration you wish in this arrangement we want you to mention it, so we can send your statements back to the Great Father. Three years ago he spent a great deal of money in sending a commission here, and it seems that you did not like the propositions then made. He now sends another with other propositions, and instead of pointing out in it what you do not like, you simply say that you will not sign it, which is no reason.

You speak of sending a delegation to Washington. There is a law to prevent it. Only last winter one of the biggest chiefs of the Sioux went to Washington. They would not

listen to him and he had to beg money to get home with. Now, as your friends, we would advise you to speak of the propositions sent you. If there is anything wrong, mention it, that we may send your objections to the Great Father.

We know very well that he thought that he was sending something which would be welcome. We certainly would not have brought it had we thought it would not be acceptable to you. I hope you have considered the subject well, and for your sakes you will send some message if you have any. I do not say that he will send another commissioner. I do not say what he will do, or will not do, but I advise you to send something that he may read and see that it came from men of sense.

NO-DIN-AH-QUAH-UM. I wish to talk to the Indians, and wish notes to be taken of what I say. Pillagers and men of this place, it is to get you to act as a unit and in your interest that I speak in your behalf. Do not lay upon me the imputation that the white man has turned me to his side on account of the words I may utter. I shall talk of the cause that has been rankling in our bosoms for a long while and has caused many troublesome thoughts.

You all know that we all hate the prairie country, because it is cold. It has been my idea that you should have considered this matter thoroughly and, instead of going to the prairie, to arrange in some way so that we can be permanently located here. The main idea that actuates every man here is to remain at the place of his nativity. That is the idea that is foremost, and which ought to be considered, so we will not make a mistake.

This matter is now within your grasp, and you can achieve it yourselves. You can do more; you can ask these commissioners if they will invite our fellow-Indians living on this reservation with us—those living in the

woods—to reside on this reservation and make it a common resort for us here.

That is all I have to say relative to the signing, if that is what you call signing. For my part, I am against having anything done clandestinely. If I touch the pen, I will do so because I think I understand what I am doing it for. I am against having anything done in secret. If it is my conviction that I am right, I shall touch the pen under that conviction.

My heart hangs just like the heart of my nephew, Sturgeon Man, as shown by his speech here. I am afraid of the Pillagers; I am afraid of them because I know what they are and what their impulses may lead them to. I have been a young man, and I have worked hard against the impulses of the young men. When I look at the number of men here, and the women with their children over there, I remember that it is their interest which we should consider. We ought to advise with each other as to what is best. I do not remember exactly the number of years, but it seems a long number of years that support was promised, and that is what we ought to discuss and understand intelligently among each other. My heart hangs in this way. Whenever I have a morsel to eat it is the greatest wish of my life that I could have every one partake of that morsel with me. This is the feeling which actuates me in expressing myself in this way.

HAH-GE-GAH-BOW. I was selected also to speak for the people. When the whites came here and visited us they also appointed me as speaker. You can see this man sitting here, the friend of our fathers (Mr. Rice). The value of the land that was ceded by our fathers ought to have been a sufficiency to have supported us all. It has pleased the Master of Life that we should enjoy everything pertaining to this lake upon which we are placed. When he put us here he put also the wherewith from which we should get our subsistence. We used to

put a great deal of trust for our subsistence on that lake that they are now spoiling for us. It was the pleasure of the Master of Life that we should get from the waters in this lake what should be our subsistence, and the Master of Life thinks to-day, "I have put in that place what I want my people to enjoy—the fruits and everything that is grown there." You must see yourself that it is all spoilt by the whites. That is the reason that we are compelled to dig snake-root sometimes for subsistence. If it had not been for the action of the whites in stopping up the rivers with the reservoirs we would not be compelled to do that for a subsistence. We thought we had arrived at a time when a settlement for those reservoirs should be made; something of a sufficiency to support us; that is the idea we still entertain. And, my friend, you are the one who told us to keep quiet and live in peace, and that is why we have; but we see that those dams are conquering us. If you had not spoken to us we would have opened all those dams long ago. My friend, I have told you the truth.

KAY-GYAW-JE-WAY-BE-NUNG. My friend I wish to yet say a few more words to you. I wish to tell you how the way you have spoken to us looks to me—about the persons who came here, the commissioners, who got some signatures, those from Washington. That is the very way they went at us—they whipped us with words at the time that they saw they could not effect anything here. I was the one who got up and told them that we did not want and would not receive anything like that. That is the way I expressed myself to you, and we do not wish to have anything that will harm us at all, to befall us.

All that we are contending for is something that will support us, which is why we are in council and debating matters relating to that. We can now see right through you and that you are a white man; that whenever you are talking to Indians you know what weapons to use to

them. We are not scared at all; what do we do at which we should be scared? We do nothing of that kind.

It is not you, who are a white man, that we talk in this way about. It is the Indians, who have a claim against the Government, which owes us something—that is who we are talking about. That is what we say, and we say it all together. There is nothing which would harm the Pillagers so much as that which you now bring to them. It is our property, and it is for us to take care of it. We will *not* give up to the Indian who wishes to sign away our rights to this place. We do not wish to restrain any one who wishes to touch the pen, but we wish to do that to him [making a sweeping motion with his arm] and move him away, so that he can not touch the pen. That is what we have made up our minds to. This is our conclusion, and we do not wish to accept of the propositions you have placed before the Pillagers. My friends, I wish you to think that that is our ultimatum.

STURGEON MAN. The more we talk with the commissioners the more they look as if they wanted to intimidate us; tell them that they may go home.

[So much disturbance was made that the council was broken up. A few minutes later an Indian appeared before the commissioners, saying he wanted to know if they were going to listen to the man who had spoken (Sturgeon Man) and go home, as in that case he would do so also. Mr. Rice replied that the commissioners wished to hear from other parties, and that they who desired to speak would be given an opportunity. An Indian afterwards came forward to show Mr. Rice some papers and letters he had, demonstrating that he was the son of a chief now dead, and requesting a letter from the commissioners to aid in increasing the size of his band. He was promised the desired letter.]

FIFTH COUNCIL AT LEECH LAKE.

AUGUST 13, 1889.

The Indians spent this day in counciling among themselves, but at 5:30 p. m. the commission received a message that they desired to meet its members in council, whereupon the commissioners appeared at the school-house, where the Indians had already assembled.

MR. RICE. In accordance with your request we meet you this evening, and are now ready to hear what you have to say.

MAY-COD-AY-WE-CO-NOY-AY. The words of the man who will speak after me are the words of the Pillagers as a body.

NO-DIN-AH-QUAH-UM (addressing the Indians). After my words yesterday, my friends, I thought we had better discuss this matter well before proceeding further. I thought that my words would have effect. I was extremely surprised that a motion was made to call a council to-day. This was disrespectful to the commissioners.

The results of our consultations are all for the best. I was not empowered to utter the words I used yesterday in the council and objections were made to it. If I made a mistake, of course I owe them an apology. The reason I spoke in the way I did was, that I was afraid our friends here (the commissioners) would take offense at the words uttered yesterday, and I thought it was better to say what I did, even without authority. I was afraid, under the excitement at the time, we would become estranged, and spoke under impulse. It is desired that the speech I made yesterday be not made a part of the record, and it is in accordance with their wishes that I made this demand. I make this request because I think a great deal of our people. That is all I have to say for the present.

There is another man who will speak. I do not know what he intends to say.

Mr. RICE. Whenever a man comes frankly forward and says that he has made a mistake, and has uttered that which he did not intend to because he was under excitement, of course we will take it out of the record. Nothing pleases us so much as plain, straightforward, honest talk.

STURGEON MAN. My friends, I appear to you now as an Indian. [Meaning that he had not assumed paint, feathers, and a blanket.] They have opened the door for me and allowed me to speak again to you. And you know, my friends, that it is the wish of the people here that I should utter these words in their behalf, and that I should tell you their feeling. I wish to say a few words right here. I wish to speak on my own behalf, and that you should see me as I am, all three of you. It is a positive fact that I am selected—I am hired, as it were, to speak to you.

My friends tell me that whenever a man speaks hard to you, do not get cross over the matter—overlook it. That is what I am told to say, and that is the way I am told to act.

My friends, I am told to say to you that the Pillager Indians had no faith in themselves. That they should not detain you very long, before going to our own work, which it is so essential that we should do. They say that we ought not to speak to our friends any more; that we shall tire out our friends. There is a great deal for us to do, and we ought to be attending to that kind of work. They say that they do not wish to have this act of Congress at all; that they do not want to accept the propositions made to them. That is what they told me to say and that is all they told me to say.

MAY-COD-AY-WE-CO-NOY-AY. A mistake was made by the messenger we employed to call this council. If you wish to have anything more to say, we will have our chiefs see you.

Mr. RICE. I hardly think it is for your good to send to the Great Father the only message you have delivered. I think if you have any regard for yourselves, and I know you have, you will send a different message. I think the chiefs should speak. He will ask, "Where are the chiefs?" What shall we say? He will think we made a mistake, and that we did not find our way to the Pillagers. He will ask why you sent to him the messages you forwarded three years ago; what can we say? He sent us the paper you signed, and we have all your names. You said you did not want to go to White Earth. He will ask if you were laughing at him then, or if you are laughing at him now. He will ask if the chiefs are dead? I have looked over the list and find that not one of them has spoken. When he sent us to bring a message to the chiefs, and through them to the young men, he will want to know if we found them.

He has had hard work for years to keep the whites from your reservation. He keeps now at Fort Snelling and in the vicinity hundreds and hundreds of troops to protect you. There is no trouble among the whites. Do you wish him to turn his back upon you? If so, you can probably force him to do it. We are taking back to the Great Father from the Pillagers no message but insults. One man gets up and says that he speaks for the Pillagers. He says he speaks for the chiefs, the headmen, and the young men, and you send through him word to the Great Father that you will throw the first man who touches the pen into the lake. You will say that the man who attempts to touch the pen will be brushed away, and that if it had not been for me you would have destroyed the reservoir dams.

What words are these for us to take to Washington? Threats and insults? Do you know what the consequence will be? Talk about your land—about not parting with your land—you don't know what you are saying; you do not own a foot of land. This land was taken from you

and the British, and the Great Father has never given it back to you, but as a kind father has permitted you to live here as his children. As I told you yesterday, you can not sell a tree and have no control over the reservation. If a white man comes here to trade you can not interfere with him or prevent his remaining, as he has the same right here that you have, for he has the permission of the Government.

You have heard of the trouble that the Mille Lacs are in and have been in for years, because the whites are surrounding them, wanting their land and their pine. To prevent a repetition of those troubles at White Earth, Red Lake, and here, he has sent us this message: To stand between you and the white man, and to give the Indian land which he may hold as the white man holds his. As soon as it can be accomplished, each Indian will have his patent—each man, woman, and child—and then no one can trouble them further. We made this arrangement at White Earth, and they are now out looking up the sugar bush and the hay lands, so each may have some of his own.

He told us to come here and make the same propositions to you, and then to hurry on to Mille Lac and try to give them relief, but, judging from the last news we have received, they may be driven from the reservation before we can get there. You talk of selling this reservation. How much of it do you sell when you have taken out your allotments? You get the most of it yourselves. You will be so little disturbed that you will hardly know that you have parted with any. You will not only remain here, if you wish, but your Great Fathers offers to send you money already appropriated. Is there a man among you who refuses money when offered?

When we have sent the words you have spoken, who will be brave enough to speak on behalf of the Pillagers? When you have thrown away the few friends you have, will you be any stronger than you are now? Where will

you look for friends after treating the Government in the way you propose? Are his, the Great Father's, white children going to take up the fight in your interest as against him? I do not know of a man of sense or influence who will dare to say a word in your behalf hereafter. You have treated him with contempt. You have not even asked a question in regard to the measure that he sends you. He will make inquiry, and he will discover who instigated all this. After all these years I have worked for you, will you refuse the opportunity to better yourselves, now offered? I am so surprised that I do not know what to say. It seems to me that you are asleep, or else there is some evil spirit poisoning your ears. I can say no more. I received word this afternoon that the chiefs wished to meet us at 9 o'clock to-morrow morning. Perhaps you wish to withdraw that request. If so, do it.

O-GE-MAH. No one pushes me forward to say what I am about to. I am at a loss. I have not seen the message you brought here to be discussed. You have been here a great many days. If anybody had come forward and asked you to state what you have brought, we should have understood the whole thing by this time. It would have been a pity, after all this discussion, if we were unable to say that we object to such and such points, and we do not think it is right to decide without discussion. We have had a council to-day of the chiefs and many of the young men. We have discussed this matter fully in all its merits, and we made up our minds it was about time to ask you about the propositions you bring and have some light thrown upon the matter. I have been waiting for this moment. I understood that this moment would come; now it is our turn. Now, remember, my shake of the hand with you is for 9 o'clock to-morrow morning.

Mr. RICE. I feel that light is breaking. There is nothing in that paper that can not be discussed or that we can not explain to you. If there are any points you do not understand, think them over and ask us about them in

the morning—not once, but a dozen times if necessary; we came here to wait patiently.

No-din-ah-quah-um then addressed the Indians.

MAY-DWAY-WE-NIND. I wish to say that the interpreter made a mistake in translating for me yesterday. I did not mean that if a man should sign he would go into the water, but that if a man signed he would sign on the water.

STURGEON MAN. Thet chiefs are ignorant of the paper that you bring here.

Ben Fairbanks had the paper you brought here and that you are now discussing. The paper was read to us by persons who did not understand it very well themselves, so as to give right interpretation. Although many understand how to read, it is difficult to understand the bill thoroughly. We went to the Rev. Clement H. Beaulieu, who is the one who interpreted to us. There were three of us who went and had it read, and we understood the whole thing as it was.

I wish to speak of one thing more. It was understood there were fifteen bands of Indians who will participate in the \$90,000, and the Red Lake Indians brought word that there was \$90,000 to be given to them alone. The Rev. Clement H. Beaulieu listened to them and they said that, and also Ben Fairbanks. The men told the Rev. Clement H. Beaulieu and Ben Fairbanks that they misconstrued the bill relative to the \$90,000. I told them we understood there was fifteen bands to participate in the \$90,000. The old captain of police said there was \$90,000 to be used for the Red Lake Indians alone. The reason we objected to the bill was that \$90,000, used among so many Indians, would make our per capita too small. That is, I suppose, the same bill that you are talking about.

An Otter Tail Pillager, living at Pine Point, then stepped forward and addressed the Indians in a forcible speech,

telling them that his band had gone home because they had crops to look after, if the Leech Lakers had not; that they had not time to remain and take part in their wrangles, and that they accepted in all respects the propositions made by the commissioners, and then addressed the latter as follows:

We wish you to understand that our band will follow the course of the people at White Earth. We have agreed that those who did not receive annuities on the reservation, should not be allowed there. There is a family at our place which has just arrived there and has marked out a good deal of land. They were brought up outside of the reservation, among the whites, and they have taken the land since the agreement was made at White Earth.

We would like to know whether you are going to pay for the land improved under the working clause, and give those who have cultivated ten acres a certificate for forty, and whether you are going to give land to others without the working clause being operated in their cases.

A man there who has made improvements for seven years, has sold them. Is that allowable? The land is all fenced in and opened as a farm. It happens to be a white man who has hold of the land, and his reputation is very bad. It was my son who sold the land and improvements. He is a good worker, and I am not well pleased with his action, after working so long on the land and then selling it to this white man, whose reputation I do not like.

Our Great Father has given privileges on the reservation to a white man who has no interest there. He does whatever he pleases on the reservation, as though it was his own. Is that allowable? I crave a piece of paper showing whether he has a right there. I do not wish that man to be in my way there, relative to the land that was bought for me to reap the benefits of.

We have never had any trouble with the white men who are married in our people because there was, so to speak, a line between us.

The temper of the man of whom I speak is so violent that once this summer he was aiming at me with his gun.

Mr. RICE. It is customary for your Great Father to send commissioners to make treaties, and then send others to carry them out, but in this case it is differently arranged. He sent us, not only to make the treaty, but to make the allotments. A man and his family need not take their land all together—one can take his in one place—agricultural land—and another can take hay land, and if there is a piece of sugar bush, one can go and take that.

It is left to us to say what land you shall take under the act, and where, but we want you and the White Earth people to make your own selections, when we will confirm them.

To show you that we have respect to the right of the Indians I will mention that at Red Lake, after the negotiations were all over, we called the Indians up and read the roll to them to decide who should stay there and who should not. We left it to the Indians. Notwithstanding all the care taken they made a mistake and sent all the way down to White Earth to have it corrected. We did the same at White Earth, and we intend to do the same with you. We shall not do anything against your interests, and if there is any difficulty we hope to have you satisfied at any rate. The white man has no right to take anything from you. If you have any bad white men there it is an easy thing to send them off. The Great Father has now adopted an entirely different policy towards his real children. He has arranged a way to settle difficulties without resort to hard words or blows, and when we come down to Pine Point we will look into your matters and do what we can for you. At White Earth some white men had selected land, but they were stricken from the rolls. The white man has no right to buy your land or your improvements.

The law says expressly that no white man shall buy your allotments, although if one of you is not satisfied

with his selection and wishes to change with or sell to another Indian, with the consent of the Secretary of the Interior it can be done. If there is any white man there interfering with you it should be reported to the agent, who has the means to correct it.

PINE POINTER. Will the people of our band receive under the bill all the benefits that the White Earth people got?

Mr. RICE. The same benefits.

Council was then adjourned.

SIXTH COUNCIL AT LEECH LAKE.

AUGUST 14, 1889.

O-GE-MAH. I am addressing my people, and I wish the commissioners to know what I am saying. It is this: First, If you should accept of this proposition, it is essential that you should understand all the points contained in that instrument. We must ask questions, and then have them answered. A great many things escape our memory. If this meets your views, and I know it does, that will be our way of procedure.

(The friendly Indians were largely present at the opening of the council; but those opposed to the negotiations came later and with such noisy and hostile demonstration that the business of the council was, for a time, interrupted. The hostile Indians were demonstrative and threatening, and clearly expected to intimidate the commission and the friendly Indians, so that no more councils would be attempted. Signally failing in this, they became quiet, and after a period of silence one of their number came forward and said that the occurrences of the morning were not expected by a majority of the band and were not approved by them, and that it was their earnest wish that it might be wiped off the paper and not be sent to the Great Father at Washington. After a short consulta-

tion it was agreed that their wishes should be complied with; it was accordingly stricken from the record. From this time on, no further hostile demonstrations were made, and the commission proceeded with its tedious work without further interruptions.)

RUTH FLAT-MOUTH. I have a few words to say to the Pillagers, to my relatives, those living in poverty together at this place. It is twelve years since I adopted religion. I feel in my heart that I have a duty to perform, in pitying every person who deserves pity, and I ask the Master of Life to help me in my efforts. I think that I am helped.

I have been trying very hard and I have succeeded in my efforts to carry myself so as to command respect. No one has given me any lessons. What I am going to say comes from my heart. I do not believe that it will be possible for any person to state to me just exactly what I think. I think it proper to carry individual ideas, and I wish to do so. While hearing your several discussions I have been listening very attentively. I have understood that you were to be of one mind and a unit in feeling. It has pleased me very much when I heard you were to be so, and I hope and wish that it should take place. I ask every day for the divine aid in this understanding on account of my race, and pray to Him that He shall have pity on the Indians in relation to this matter, especially those who are ignorant and do not understand anything. My relatives, it is the greatest and most sincere wish of my life that we should be pitied by the Master of Life and that He should be pleased to spread over us peace, so that our village here shall have harmony in it and not turmoil.

Now, about what the white man has enacted and which now lies upon the table. I wish that you should hear me and take pity on my words. I wish you all to have your ears well open so that you can listen, that you should understand for yourselves what is good. It is easy to understand what is good, and it is just as easy to listen to

the evil spirit. It is my sincere wish that you should all listen attentively, so that you may understand everything that is said to you. I remember my father when he used to live on this earth, and I know very well that at the time of his death he left me the hereditary chieftainship, but it was my wish that my brother should carry the burden which I did not wish alone, but my brother is not here to-day on his own land. I am the only one who represents our father now on this reservation, and I shall follow the track which is good. That is the way I am going to travel. That is all I have to say, and it is my sincere wish that the chiefs should talk after me.

Mr. RICE. I know how it is with you; that you are liable to be misinformed. We know of the messages sent from below by your enemies. We know that promises were made and letters written. We know that one was written telling you that if any one was arrested he would not be punished.

Your old men are passing away, and soon will be gone. The young men here will soon take their places. It is wise for the young to listen to the old, because the responsibility now upon the old will soon be upon their shoulders.

I am not surprised that some of the young men, when they saw these papers, supposed they were brought here, for you to sign. That is not so. All that are here are to enable us to give you the information you desired. I also know that no one can listen or speak properly when he is excited; so we will sweep away all that occurred this morning.

We know by these papers sent from Washington, which many of you have signed, that you wanted your Great Father to permit you to remain here. After long consideration, the Great Council consented that you should remain. We can now appreciate how uneasy and alarmed you were when told that our object was to remove you. I confess I was mistaken in the Pillagers when I came and learned the thoughts that occupied your minds. I did

not suppose any one had been so wicked as to try to make you believe that you were to be compelled to leave the homes of your fathers. After all the stories had been told you, I can see where the trouble was. We bring you the most solemn assurances, not only in words but in writing, that all those who wish to remain here can do so. We are authorized to tell you to take your allotments wherever your please—your hay lands, lands to cultivate; take your sugar bush; take anything that can be of use to you, except the pine. We are not only authorized to tell you this, but to carry it into effect. We are empowered to give you your allotments, with the title to them. You are to have the first choice. Go and take whatever you please. Take it, and it will be given to you. Not given to hold as you hold this land now, but the patent will be given you. Every head of the family takes 160 acres, which is a very large farm. Every single man and woman each takes 80 acres, and every child takes 40 acres, which is selected by its father, or its mother, if it has no father. Every orphan who is not of age receives 80 acres. When this shall all be done, you will cease to hear anything more of the troublesome whites.

We invited Rev. Mr. Beaulieu and Mr. Fairbanks here this morning, and others, to see that our words were not misunderstood. We have granted your request that you should have your own interpreter.

You have been told that you will have to divide with a great many. That is not so. You divide with no one; others divide with you. Your brothers of the White Earth Reservation have sold more pine land to be thrown into the common pool than all you have got. The Red Lake Indians put into the pool twenty dollars and more where you put in one.

There are friends of yours here who can read and who know all this. There are men who have made you believe that this proposition was sent to you by your enemy. Would an enemy send you money in advance of the sale

of any of your lands? Before a foot of your land is disposed of, the Great Father sends you \$90,000 per year. Now, we can not tell you exactly how much that will amount to per capita, for we have not taken the census of all the Indians yet, but we have gone far enough to know that put on top of what you now receive it will amount to over \$10 each—that is, for every man, woman, and child. It is also provided that if you wish to have any portion of it expended in farming implements, it shall be done. If not, it shall be paid to you. But it is left to you to say whether you will have it all in money or not. Now, when each man, woman, and child gets an allotment, how much will you have sold? What I have told you is just what you asked for in this paper, excepting that your Great Father, in consideration of certain matters being unsettled, will send you the \$90,000.

These are matters we wish you to consider. Cast from you all you have heard contrary to what we say. The greatest responsibility rests upon you. Not only upon the chiefs, but upon the braves and the young men.

BIG DOG. I am telling the chiefs to be very careful in what they say in their talk. I shake hands with you. This is a matter of the utmost consequence. I am speaking to the chiefs, the braves, and the young men, telling them to take into consideration that there are many here now who will not be here fifty years hence. Nor will those commissioners, by their looks. But there will be some people amongst them who will carry this out.

(Kay-ke-now-aus-e-kung made a speech to the Indians which he did not wish to go on record, in which he counseled further consideration of a treaty.)

NOW-WE-GE-SHIG. My friends, we now understand everything you have just said. Will you please not to hurry us, but allow us to deliberate on the matter.

Mr. RICE. There is nothing gives us more pleasure than the prospect of your being united, because otherwise

you can not be strong, and I shall feel whenever a Pillager visits me in St. Paul, no matter whether he is an old or a young man, that I can take him by the hand, as I always have done. Now, that we have got down to business, we hope you will take in consulting all the time required. Any misunderstandings amongst yourselves must be settled by you.

An adjournment was then taken, at the request of the Indians, until 4 o'clock.

AFTERNOON SESSION.

Bishop MARTY. This bill will benefit the old men, and it is especially arranged for the good of the young men. If the young men had now plenty of game, then I would say to them, as I said to the Sioux, "As long as you have plenty of buffalo, stay as you are;" but you know as well as I do that the game is fast disappearing, and that there will after awhile be none left.

During the fourteen years I have been with the Sioux the young men have concluded to take lands and go to farming, making a living in that way independently for themselves. Instead of going a great distance for berries, plums, or other fruits, they have in their fields and gardens whatever they wish of vegetables and other good things. Instead of running a great distance through swamps and over stumps and stones after moose or deer, they have the cattle right in their yards when they want meat.

The lands the Chippewas have are even better than those of the Sioux. But you need to make use of the lands, with horses, cattle, and farming implements of every kind. Among white men, if one needs anything, he has to sell a part of what he has, buying with the proceeds that which he needs. The Indians can not do that because they are not very smart at making a bargain and generally do not get a good price.

We have an example of this in the Indians of Lake Superior. They have sold their pine, and to-day are as poor as they ever were. Your Great Father does not want you to lose your land and your pine in the same way. He first wants you to have all the land you can use, and then wants you to sell the remainder, which can be sold on your behalf at the very highest price. With the proceeds he will buy whatever you need to make you prosperous farmers. I said to myself, in thinking it over, if the Sioux can succeed so well, surely the Chippewas, who have always been a peacable and tractable people, can do well. So I conclude, although it is pretty hard to travel in this country, and I was very sick on my way back from Red Lake, because I am an old man now, I concluded that I would come and talk with you so you would not lose these advantages, but be benefited by it just as the Sioux are. So I am here now to explain matters and answer all your questions. This is an important moment in your lives, and we can not take too much time to ascertain what is best and put it into effect.

The Great Spirit who made you all wants you to have plenty in this life and to be happy when you reach the other world. He has given us reason so that we can see what is good and what is bad, and we must make use of that reason.

He has given us eyes; but if we shut them, we do not see. If we use our reason, we can discover what is best for us. I have already prayed to the Great Spirit to help you to understand what is best for yourselves and your families. I shall not give it up until I see you started on the right road.

Commissioner WHITING. My friends, I had purposed to say a word to you this afternoon, but the good bishop has come and has given you an interesting talk. As I believe you came this afternoon to ask questions of the Commission, I must not take up a single moment of your time, except so far as any inquiry may be made which I am able to answer.

Some time before we part I want to speak a word so loud that every Pillager shall hear. The chairman will now give his attention to any question to which you invite it concerning this bill.

NO-DIN-AH-QUAH-UM (after addressing the Indians). It has been understood that any excitement or ill-feeling in these councils should be put aside, and it is essential that it should be.

We have always expressed our feelings relative to our friend who has paid us a visit here. We have expressed ourselves in such terms that it can not be mistaken that it was a pleasure to us to see him. Although circumstances have arisen which were unpleasant, it now seems brighter, and we will proceed to business on that basis.

While our friend was on a visit to the other reservations we heard that he had had a misfortune, having lost his brother, and that he had to go to St. Paul relative to that. We said that we would cast everything to one side which would cause excitement or ill-feeling. We have heard that there was to be an arrest there of a young man, on account of that transaction, this morning. We wish to know if that is a fact. We understood that his name had been put down. Just see; the Master of Life listens to us. We sent for one of our ministers to implore divine aid. We wish everything should go peaceable. Have we asked in vain? I ask for my satisfaction and that of others. Here is a bishop and a priest who have come here. They are men of prayers, and we wish everything conducted with peace and a good feeling.

MR. RICE. I had supposed that all that had occurred this morning was buried.

RUTH FLAT MOUTH. I have been permitted to ask a few questions. I wish to know what will be the value of the land which troubles us so much and which was borrowed from the Pillagers? Also, what will be the amount paid for the damages done by the overflow, which destroys

our subsistence? That is all I have to say. This is all I am permitted to ask. We wish to know what the prospects are of obtaining anything for the land which we loaned, and for the damages for the reservoirs.

Bishop MARTY. I am sure that when the attention of Congress shall be called to this matter that they will pay you a reasonable sum for the land you gave for the Menomonees. Congress never acts upon anything until the matter is brought up by one having authority and in whom they have confidence.

As we have been selected by the white people to come here and speak to the Indians in their name, Congress will listen to us when we speak in your behalf. The other two commissioners have already promised to bring this matter before Congress, and I am only too glad to join them in it.

The claims arising from the reservoirs are more recent, as it is only three years since the damages were estimated by commissioners appointed by the Government. It is now well known what your claim is, and it needs only to be brought before Congress to be allowed.

I told the men at White Earth why these grants had not been made sooner by Congress. It was because it was feared that the money would not do you any good; that it would slip through your fingers, like other money you have received. But when you accept this treaty and thereby show that you wish to make a fresh start, then the means will be given to you. If you accept this offer and sign the treaty, we can go before Congress and say, "Here is a people who are ready to make the very best use of what you give them. These men have sense, thinking not alone of the present, but of the future; not only of themselves, but of their children." We know that the majority in Congress, who are friends of the Indians, will be glad to hear it and will grant their petition.

O-GE-MAH. My friend, I wish also to ask you a few questions. My friend, do not let my words offend you.

This is the first thing the Pillagers wish to know of you. It is because all these other persons, who have made these former bargains, our old men, our fathers, most of them have died off, and a great many of our young men think, and they think that they think right, that they ought to have these old affairs settled before they enter into any new arrangement.

My friend, when we heard that you were coming here, we thought that you were standing on top of what is due the Pillagers. My friend, I speak to you because I know you are in power. I know you have the strength, which is why the Pillagers do not want to step over the old affairs, and begin a new one. Our fathers, who made the arrangement with you, told us, always to keep in view the land that had been borrowed from us. "Some of these days, while he is living, just ask these questions," of you my friend.

About the reservoir dams, my friend; you can not imagine the damages done to all our people in the way of subsistence. It is the sincere wish of all the Pillagers that you should be capable of managing so as to enable us to come to an arrangement relative to all these things. The men, women, and children demand it of you. Now, my friend, do not be surprised at what I tell you. The reason there is so much trouble with these Pillagers is, the promises and the faith that has been broken with them; so many promises made have been broken that they are suspicious about any promises made to them now.

Now, my friend, I shall talk to you of something else. At the time the Pillagers went down to Washington and ceded a large portion of the country, there was a promise made of some money that should go to one side—the utility fund—for the use of the Pillagers here. My friend, I am a little foolish, and if I had not been I would have saved the paper which was given to me in St. Paul. What I allude to in that paper, I took \$300 of the money to bring me here when I was coming back. That, my friend,

is what these Indians ask of you to-day, the utility fund. The Pillagers say that they wish our friend would cause that money to be placed in our hands.

At another time when they were paying me here, they used to put some money into my hand for the services of my band, but while they were paying me, that money disappeared. Why does our Great Father take away from us that which he had promised to give us? I never take back any land that I once sell him. That is all I have to say, my friend. This other man will now speak to you.

Mr. RICE. It is very hard to answer some questions. It is sometimes very difficult to give reasons, even when you think you have them. In regard to the land you lent and in regard to the reservoirs, I have done all I possibly could to keep the matters alive and keep them on the books. But you all know how it is; when you see a big thing little things are lost sight of.

If we could do so, we would take all these back matters and put them into this, but as I explained to you the other day, should we do it, the whole thing must go back to Congress, and how long it would remain there no one knows. But as it now stands, if it is successful here, the President's signature makes an end of it. But the Great Father told us to listen to all you might say, put it in writing and send it to him that he might look it over, which we hoped would be satisfactory to you.

After we received our appointments, we met in St. Paul, and spent several days consulting as to what course was best to pursue. When this business is disposed of, we can all go to work and see that justice is done as to past transactions.

Council then adjourned.

SEVENTH COUNCIL AT LEECH LAKE.

AUGUST 15, 1889.

O-GE-MAH. What I want to say on behalf of the Pillagers is that matters should be pointed out to us in such a way that it will be impossible to misunderstand. It is absolutely our wish, and we covet to understand this matter thoroughly. We will, during the day, point out the different points on which we want information.

NO-DIN-AH-QUAY-UM (after telling the Indians that they should begin to ask questions). The time has arrived when you should explain once more the whole nature of this agreement. How many bands will be included in this agreement of consolidation? How much will each person, including the children, be entitled to? Will it fall to our lot to remove from this place? Will there be any land left for children who may be born hereafter?

Bishop MARTY. As the other two commissioners have already spoken to you of these matters, I will talk to you this morning. You will see that we have the same understanding, because I will tell you just what has already repeatedly been said. All the bands of the Chippewa Indians in the State of Minnesota are included in the consolidation. You are one people, and Congress wants you to be all treated alike. It is also the will of the Great Spirit that the Indians should be one family, one people, and that they should love each other as brothers. Is that a satisfactory answer to the first question?

O-GE-MAH. I understand that.

Bishop MARTY. The second question was whether you would be allowed to settle here or would have to go elsewhere. Congress offers you the privilege of remaining here or going to White Earth. After you are once settled permanently you can not be removed. There is a great difference between this and all other treaties heretofore made, when men would come from the Great Father to

you and leave after making promises and never come back. If that had been the plan this time I would have had nothing to do with it, as, if it had been like other treaties, a later messenger might have repudiated what we do. We three have been appointed, not only to get your consent, but to make allotments. Every one of you is to take the land to which he is entitled, when we will make report to the Great Father and procure the patent for him. Our work will not be done until each man has the writing for the land which he and his wife and his children own. You will then hold your land by exactly the same title as the white man. To make sure that you do not lose it no white man can buy it for twenty-five years. So the land you select is to be yours forever, and it will be free from taxes for twenty-five years.

No land will be reserved for children born after the allotments are made, because every family will have so much land that it will be sufficient for them and their children. When a father or mother dies the land will go to the children, and when a child dies the land will go back to the father and mother, and when the parents are dead it will go to the brothers or sisters. There will always be sufficient land because it will remain in the family. Does the speaker understand it?

NO-DIN-AH-QUAY-UM. Yes.

KAY-ME-WUN-USH (after telling the Indians that he did not wish his motives to be misunderstood by them). Well, my friend [Mr. Rice], I suppose it has been ordained that we should meet. It must have pleased the Master of Life that we should ask these questions of each other. I shall inquire for the benefit of all the Indians and the mixed-bloods. At what time will the allotments begin to be made where you visited before coming here? When will the Indians be in possession of what you promise them? Will the Indian select for himself, or will a white man select for him? When is there a chance of our receiv-

ing remuneration for the land we loaned the Government? That is all that I have to ask at present.

Mr. RICE. In regard to the allotments, you can take them at once. After this agreement is concluded, you need not wait a day. You are allowed to make selections yourself, for yourselves and for your children. Your agent is authorized to select for the orphan children. I suppose he will consult with you. He is here and can speak for himself.

We received news yesterday that the White Earth Indians were tumbling over each other in their haste to secure their allotments. Their land is, however, surveyed into lots, which yours is not as yet. The law requires that whenever your lands shall cross a line there shall be just settlement between you before the deed is given, but that does not prevent your taking possession at once. One of you may have to move a little to one side or the other in order to let the Government lines come straight, so that you will always know where your boundaries are. The money is already appropriated to make the survey, and as soon as that is done we are authorized to come back here and give you your papers.

The head of the family must take his 160 acres in one place, but he can locate his children around wherever he pleases. That is arranged so that you may have agricultural lands, sugar bush, hay lands, whatever you want. If we can get around in time the survey will probably be commenced this winter, as the money is already in the Treasury. We understand that the outside lines have been run, and if so, it will not take a great while to subdivide into smaller tracts.

In regard to the land that I borrowed of you so many years ago, all that we can say is that we will go to work at once and see what we can get for you. We give you our word that we will do the best we can.

WAY-ZOW-WE-GWON-ABE. I have also a few questions to ask our friends. Will there be any pine left for the

use of the Indians on this reservation? Another thing, I am very deaf; so deaf it is hard for me to understand. That no one will be deaf, but that all these Indians shall understand, we wish as definite an answer as possible. We do not wish to hear the words "may be" or the word "if." Referring to this new payment, how much do you suppose will be actually received per capita?

Mr. RICE. We know that out of the \$90,000 which your Great Father lends you each man, woman, and child will receive nearly \$10. We do not know exactly, because we have to take the roll as we go along. We know it can never be less, because after the sales of the lands begin the amounts paid you will increase. It will continue to increase until the sales, less expenses, shall amount to three millions. It will be different from other treaties, as instead of decreasing the amount coming to each will increase.

In regard to pine, we have already recommended a mill for Red Lake and a mill for White Earth. We shall also recommend one to be built here, and if successful you will have lumber to build houses and for other purposes. But after the fund shall amount to three millions you will have money to buy whatever may be necessary.

KAY-HE-WUM-USH. Sometimes I feel it a burden to be pushed forward so much to ask questions, but I have so much to say. There is another thing that all these Indians and mixed-bloods ask of you. The land that our fathers ceded to you in Washington, and which we are still in chase after; at the time of the cession in Washington I was there, and remember having seen you sitting with the commission. The Pillagers have different stories and versions of it. We wish you to state what the size of the reservation for the Pillagers was. Sometimes it appears to me like a meal of victuals, as it were. The more you eat out of that meal the less there is, and it seems as if sometimes this meal of ours is large, and at other times it appears to have dwindled into insignifi-

cance. Is there any one who has taken a morsel or a bite out of that, so as to make it look small at this time? I remember very well the time the paper was handed over to you to read about the lines of the reservation. That is all I have to say.

Mr. RICE. I remember very well all about the treaty. I have it over here in my room. There has never been anything intentionally taken from you under it. I have sent for the treaty and will read the boundaries to you. While I do not know that there was, there may have been some little mistake in the survey, owing to the change in names. An Indian stated that the blame would rest upon the surveyors.

The boundaries, in the treaty of 1855, began at the mouth of the Little Boy River; thence up said river to Lake Hasler; thence through said lake to its western extremity; thence in a direct line to the most southern point of Leech Lake; thence through said lake so as to include all the islands. That is for the Pillagers of Leech Lake.

The executive order of President Grant, dated November 4, 1873, recites the following: Beginning at the mouth of Little Boy River; thence up said river to the first lake and to the southern end of the second lake on said river; thence in a direct line to the most southern point of Leech Lake.

The additional land described in this Executive order was to be withdrawn from sale or other disposition and set apart for the Pillager Indians. So this reservation has been growing larger instead of smaller.

(A map was then produced and the reservation lines or boundaries shown upon it.)

(John Bassett then pointed out on the map the way he said the Chief Flat Mouth understood the lines of the reservation.)

JOHN BASSETT. Is that in accordance with your understanding of the treaty of 1855?

Mr. RICE. I do not know any more about it than is indicated on this map.

NOW-WE-GE-SHIG. When Jim Whitehead was here he told the Indians there was a place there where there was very nice pine, near Little Boy River. He said not to mind it, because the time would come when this matter would be remedied.

Mr. RICE. That is why this Executive order was made, to include that. That was made sixteen years ago, and is just as you wanted it then.

NOW-WE-GE-SHIG. We were never told when or for what cause that piece was cut off by the surveyors.

Mr. RICE. It was a mistake in the name of the lake, but the order of the President gives it back.

KAY-ME-WUN-USH. Every one don't understand; when was this Executive order issued making this larger?

Mr. RICE. November 4, 1873; sixteen years ago next fall.

KAY-ME-WUN-USH. There is no time lost in these questions. How small was the reservation before it was enlarged by this executive order-

Mr. RICE. What the President gave you then was 18 miles long. It was 6 miles wide at one end and tapered down at the other end. About three townships were included, some 70,000 acres of land.

KAY-ME-WUN-USH. We are particular in asking this because some white men are locating and settling inside the reservation lines. They have camped and selected some very nice pineries.

Bishop MARTY. That would not do them any good, because they can not hold such land.

AFTERNOON SESSION.

O-GE-MAH (after addressing the Indians). My friends, no one urges me to speak. I have been a listener here. There are only two sentences that I shall utter. Although the matter has been submitted to you since the beginning of these councils, we wish once more to ask at what time, in your opinion, shall we be paid, if it can be effected, for the money for the damages by the dams? That is one question. As far as I am concerned, I have put every other thing into my heart, and I accept everything you have told me. That is all I have to say. (Addressing the Indians.) You must speak very frankly and openly, and if you have anything to ask, it will be listened to.

Mr. RICE. The Great Council meets this fall. We are in hopes to get everything before your Great Father before the Council meets, and have him recommend for adjustment to the Council the reservoir and all other unsettled matters. We hope the appropriation will be made next winter, so you can get it early next season. We shall say to the Great Father and to the Great Council that if you ever will need it it will be next spring.

Bishop MARTY. I told you yesterday that one reason Congress did not send you the money was, that they were not sure you would make good use of it. At present your situation is like that of a pail without any bottom, in which no water will stay no matter how much you put in. No matter how much money is given the Indians, as they now live, they are always poor: but this treaty, when accepted by you, will be like putting a solid bottom in the pail, so that we can tell Congress that money may be paid and will remain with you. If we can tell Congress this winter that you have accepted this, and are going to work and make good use of what you have, they will pay what is due you. If you should not accept this, your friends in Congress would have no strength, but if you

all take hold of this, you can make us strong so that we can do this for you.

KAY-KE-NOW-AUS-E-KUNG (addressing the Indians). The words uttered by that man are rather a surprise to us. I do not wish to say anything to antagonize his words, but that was not the understanding at which we had arrived. We had something else to say, but let us beg a little indulgence to allow us to think over the matter more thoroughly, and to-morrow will be the great day of the negotiations.

WAB-ON-A-NO-NE. Now that you have stated the object of your mission and questions have been propounded on both sides, we have arrived at a crisis where we must understand each other. All that I have to do is to look to my chiefs here, who are going to regard the interest of the children hereafter, and for what will be our support in the coming time.

KAY-KE-NOW-AUS-E-KUNG. I wish to relate facts only as I see them. I wish to state them to Mr. Rice, because he is a very old friend and knows a good deal of our business. It can not be possible that our friend, Mr. Rice, is ignorant of the burden that he was carrying when he came among the Pillagers. The Pillagers had this idea all the time—that they wished to have that Leaf River matter settled, and also the dam arrangement. It also depended a great deal upon that being settled before they made any new arrangement. They had made up their minds that there should be no arrangement until these back affairs had been settled. Had they been you would have achieved your object immediately. The Pillager Indian made up his mind that he would accept no proposition otherwise, and this was their ultimatum. [Shaking hands.] There is just one thing that I regret, and that is, that the Government did not have you bring to us a big bank check.

EIGHTH COUNCIL AT LEECH LAKE.

AUGUST 16, 1889.

NO-DIN-AH-QUAH-UM. I wish to state that I think that what those commissioners bring is a very heavy load, but I understand it. I have been advised by no one. No one has invited me to touch the pen. What I have said is of my own volition.

I should have a very small allotment of land myself, compared with those who have large families. When we heard that our friend would arrive here, we prepared to receive him as he should be received. The emblem that I see floating above us, that is the sign of good feeling, of peace and friendship. I thoroughly believe that it is the intention to fulfill everything in the agreement. We ought to be guided by the course of our relatives who have accepted this agreement. I myself believe that it is all done in good faith and that the Indians can rely on the fulfillment of everything that has been said. We are told that if we accept the propositions made, the matter will be laid before our Great Father in sixty days, at the time when the first snow falls. We call upon the bishop. He is an apostle of Almighty God, and would of course not say otherwise than as God told him. I will ask these commissioners to raise up their hands and say that they will fulfill the arrangements made, if they are serious with us. I understand that just as soon as I get my allotment of land in severalty, it will be like a rope put on me and I will be attached to it so it can not get away. Also, that we can then, like white men, go here and there and fear no one's menaces as long as we behave ourselves. We do not understand that the lands in severalty will chain us to our places. It seems to me a very difficult task to have all the land allotted around this lake so that no one can come inside the land we have marked. I think that the Great Father is about to utilize that land on the other

side here, that which belongs to the Chippewas of the Mississippi. Do you not know that we were told we did not own a single foot of land on this reservation. As I understand it, the United States, on account of its sovereign power, owns all the land in the State of Minnesota. When I was a young man I went to the Pembina settlement and saw there the stake that marked the international line. On one side of that stake was one power, the power of our Great Father. My wife is a Mississippi Indian, and is entitled to the Mississippi lands. There is nothing left there, because the whites have robbed that section of the country of everything that is of any value. The Leech Lake Reservation is the place where I should want to abide.

Mr. RICE. What has been said by the man who has just spoken is the truth. We are not only ready to attest it here but also to attest it before the Great Spirit. The white men go into the country in advance of the surveyors. They are permitted to remain there, but they do not own the land until it has been given them in allotments.

There is one point upon which we must understand each other, and that is in regard to the reservation here. You will be permitted, before the Great Father takes possession, to take your allotments. No white man will, under no circumstances, be permitted to come in here and take any piece until you are all satisfied. But after you have got your allotments you have nothing to do with what is left. That is the point I wish you to understand. As to going where you please, you can do it as well as the white man and under the same circumstances. When a white man travels he must behave himself. That is your only restraint. You will be permitted to take your allotments in White Earth if you wish to. Not pine, but you can take the sugar bush, or any other timbered lands you want. We propose to make a paper covering all these points about unsettled matters. Then you will know

what we have promised. We will not only sign it, but a witness will sign it, and we will have it put into the paper we send to Washington. We do this so there may be no dispute after we are gone.

NO-DIN-QUAH-UM. I insist upon the raising of hands as to what I told the bishop.

(The three commissioners then rose and raised their hands in affirmation of the promises made, the chairman saying: "We promise to do all in our power to carry out the understanding.")

Mr. RICE. You have been deceived and disappointed many times, so that I am not surprised that you should put us to this unusual test.

KAY-KE-NOW-AUS-E-KUNG (after telling the Indians that the commissioners had given the strongest possible test). The reason we take so much pains in this matter is that the Government has never fully kept its promises to us in the past, and I can not be blamed for doing so when I am acting for my own benefit and for my own interest and the benefit and interest of my children.

KAY-ME-WUN-USH. My friends, the Pillagers, what slays us is the false promises of men who have come here to misrepresent things to you. I wish to ask you what has become of that which I and my children use for our subsistence and which gives us a living? Can the Pillager Indian go on the other side of this lake and select his allotment? This lake here is what the Pillager likes, here and the other side. That is the reason that the Pillager raises his voice in supplication. Another thing: If an Indian should go outside of the reservation, where the land is not occupied by the whites, could he take his allotment there? And how is the \$10 mentioned to be paid? Now, here is the point: We have chiefs and leaders of our bands. They say that as soon as we receive our allotments we cease to be chiefs. I wish an answer.

Mr. RICE. In regard to going off the reservation, the law says that an Indian belonging to no reservation can go anywhere on lands not already occupied to take his allotment. That by doing so he is not deprived of his annuities. But you can not make a selection in both places. I have told you the words of the law exactly. But as you have a reservation of your own, I do not know what construction your Great Father would place upon such cases.

In regard to the money, it will be paid to you here; that is, to such as remain here. Those who go to White Earth will be paid there. We think it will amount to about \$10.

As to the rumor about your chiefs, I have heard nothing. We are ordered to leave the decision of questions under the census to the chiefs, and that will have an important bearing upon the payment of the money and the selection of land. No government, of whites or Indians, can exist without leaders, and I can not understand why any one should wish to disorganize you. When the time comes for making the allotments and carrying out this arrangement we wish the assistance of every man—the young men and the chiefs—and we want it arranged satisfactorily to every one.

NO-DIN-AH-QUAH-UM. If a person in taking land wishes to take his own field, can he also take some sugar bush; could he make two selections.

Mr. RICE. If there is no more than one in the family, of course the different selections can be made.

NO-DIN-AH-QUAH-UM. What is meant by the "head of the family"? Does the wife come in as another person under the law as to allotments?

Mr. RICE. Yes, the law says, "The head of the family and other persons."

Commissioner WHITING. A man and his wife can take their allotments adjoining if they please, and then the allotments of the children can be taken elsewhere if desired.

KAY-ME-WUN-USH. Now, my friends, I am getting to be an old man, and you see many before you who are advancing in age. How do you suppose these old men are going to make any progress with their lands in severalty? Also, how will the money for the damages from the reservoirs be paid to us. This was talked over three years ago, and three years before that. That was the cause of our poverty, as it took from us everything upon which we depended for our subsistence.

Mr. RICE. As to the reservoir money, we think you had better let that stand just as it was in the old treaty. In that \$100,000 was paid to you, and \$50,000 to the other Indians. It may be possible that your Great Father will be willing to add the interest, but do not expect it, as we do not promise it and can only say that we shall try to get it. But that which is coming to you will be sufficient to furnish you with something to ride in. That, with the \$90,000, will give you a good start.

NO-DIN-AH-QUAH-UM. In shaking hands with the chairman I shake hands with you all. Every one must understand the explanations made about the dams. Since the dams were built, however, we have been unable to get two crops of rice. As to that money, we are imposing many tasks upon you, but wish this matter of the money for the dams to be the heaviest one. We would like some assurance from you on this subject.

Mr. RICE. After we get through this business the matter of the reservoirs is the hardest job before us. We will do all in our power to have the wrongs redressed which have been inflicted upon you. If we can clean up all these matters next winter, we will come back feeling like young

men again. All that has been said has been taken down on paper and will go to your Great Father. If we neglect any duty you have imposed upon us, it will be known not only to our posterity, but it will be known above. As we proceed during the winter we shall write to you, so that you will know just what we are doing.

STURGEON MAN. Those who did not sign the last agreement have asked me to talk for them in this matter. The men who held the councils in that school-house three years ago, the Northwest Commission, they are the very men who asked me to go and pay a visit to our friend, Mr. Rice. At the time I refer to Now-we-ge-shig, Chief of the Mountain, and John Bassett were with me. We were promised at that time by the commission \$100,000 for the Chippewas of Leech Lake and \$50,000 for the Chippewas of the Mississippi. That was three years ago. We said then we did not want to set any price relative to that, but that we would wait until some other time. We told Mr. Rice that when we paid him a visit. Our friend, Mr. Rice, asked us, "What did they say to you about the dams?" We told him what we had been promised, and then he asked us, "What answer did you give?" We said that we did not wish to comply with the treaty. Hence we think that the question is still open. It is three years since that time. We think now that as we did not wish to comply with that treaty of the Northwest Commission, and as it was not ratified, we do not think that the award for the damages has been agreed to by us, as we did not sign at that time. Six years ago there was another price fixed by the commission—the Blakely commission. We expected that that would be the award. There are a great many here who do not wish to accept this arrangement now. All the chiefs are rather timid about the matter. They do not dare to say a word. It is time for us to think over the matter. There are a great many who wish to accept the arrangement. It is time we tried to come to some understanding. I have heard many say they were in

favor of the propositions, but we are waiting for each other, and should try to do what is best for all. We are always thinking of the raid. After this let us always do what is best for the Indians. If we see this is good for us, let us look out for the children, and let us not lose a good opportunity. I speak now very seriously. I think it is about time that we should make up our minds and bring this wrangle to an end.

WOB-ON-A-QUAY. Let us try to come to an understanding. We should be united, but we should not be too hasty.

KAY-KE-NOW-AUS-E-KUNG. Will the man who does not And if I should sign, may be a great many of my band would leave me. How do you view that matter?

Mr. RICE. If we should say that these who do not sign should not participate in the benefits, it would be a threat. All such matters were buried the other day, and we will keep them out of sight. No distinction will be made between the man who signs and the man who does not. When the money comes, those who have not signed will probably change their minds and take their shares.

Adjourned.

NINTH COUNCIL AT LEECH LAKE.

AUGUST 17, 1889.

RUTH FLAT MOUTH. I have come here again for the purpose of speaking with you about the arrangement you bring for our acceptance. I view it favorably, and I wish to say that I am very much delighted with it. I want to know if it is the desire of the Government that all of those who are living on the different reservations should participate with us. The time at which I said I would sign has twice passed, and I feel as though I had been talking in vain, and I wish now that the pen should

be handed to me that I may sign. I say this as a figure of speech, but I will do so at 9 o'clock on Monday morning, when I hope there will be no more drawing back.

KAY-ME-WUN-OSH. My friend, we beg of you to have a little more patience. Do not get tired of us. After you have left we should be sorry had there been any question unasked and unanswered.

My friend, I wish to state something relative to the dam. We wish to know whether the payment of the damages will stop with the payment of the \$100,000. You speak of the interest on the money. Can not our Great Father put a little kettle on the fire and make a medicine which will cause that interest to grow? Whenever I have any patients to attend I put my little kettle on the fire and make it boil, when I do not fail to achieve my object if the medicine is good.

Mr. RICE. In looking over my papers last night I found that two commissions had been appointed. The award of the first commission was thrown aside without being considered at all. We have examined the last award and the amount put into the treaty which has not been satisfied, and with those we shall do the best we can. We will tell the Great Father that a bottom has been put into the "kettle," and that it will hold a great deal. We will tell him and the great council how you are situated, and that with the help you need you can advance rapidly.

As we expect to return here we will do what we can to make you glad to see us again, which is all we can say upon that subject.

KAY-ME-WUN-OSH. There is another matter. There are still two of us who went to Washington at the time I refer to. It is about what the Mississippi Indians did when we were down there—about the land on the other side. I recognize you when this arrangement was made in Washington. We wish you to state about that cession of the Mississippi Indians—about the property on the other side—the piece north of the lake.

Mr. RICE. The treaty of 1865? I was not in Washington at that time, and had nothing to do with it. I was there in 1863, when the treaty was made, and this was concluded afterwards. Then they ceded the Gull Lake, Lake Pokegamon, and Rice Lake, sold all the land and took this north of here in place of it. They found afterward that there was land that was good for agricultural purposes, so in 1807 was sold, the western portion of it, for the White Earth Reservation, but kept this immediately north of you. That is the way it was brought about, just exchanging twice. Is that satisfactory?

KAY-ME-WUN-USH. Yes, sir.

NO-DIN-AH-QUA-UM. I am yet capable of working, and if I was incapacitated I would not mention this. There is one essential thing we would like you to get for us, and that is, a mill. If we have a mill I should not like to sell the whole of our pine, so that we may have something to depend upon in building.

It would also be well if we could have the boundaries of our land defined. We are now blind as to how our lands shall lie. We hope that as soon as those arrangements are completed you may be pleased to use your influence so that we can have a mill, when we can progress at once.

We would like to know when, in your opinion, we may expect a revenue from these negotiations, the \$90,000; how soon do you think it will reach us? During the fall or in the beginning of the winter there is an annuity payment made here. If this money was not here at that time, many would say, "See, we expected that money and it is not here."

I suppose it is because we have increased in number that we get a less amount as annuities than we used to. I do not speak for myself, because I am barren. We are told that we are increasing in numbers on account of the number of births, but we think the number of deaths are

greater. It would be a good thing to talk to the law-makers to make the amount of the annuities a full sum, instead of \$4.80. It ought to be a full \$5.

Mr. RICE. At Red Lake we examined into their affairs, and found they had not even a board. They once had a mill, but it was rotted down. We found the same situation at White Earth. Their mill stopped only two years ago, and they have not had a board sawed since.

Upon inquiry we found that your agent had written to Washington urging that a mill be sent at once to Red Lake, and also one for White Earth, so they are now prepared to start anew we hope. And when we got to Brainerd we wrote as strong a letter as we could to have a mill sent to each place at once.

You are in greater need of a mill than they are. We tried to purchase a board the other day and might as well have tried to find a silver mine. When we saw here the remains of the old mill it reminded us of the carcass of a buffalo that the wolves had nearly eaten. We should have asked for a mill for you, even if you had said nothing of it. Whatever else you may have, you can not get ahead unless you have a mill.

That man over there spoke the other day of your pine. We intend to recommend for each of these three reservations that the President, when he knows what pieces to stake, shall reserve enough for your use. There will be nothing taken from you, and nothing will be done until you get your allotments.

NOW-WE-GE-SHIG. My friend, the words which our woman here, the queen, has said she would to-morrow, those are the words I say to you. I know that you will accept the words that I speak.

Mr. RICE. You have asked so many questions that I have forgot to answer one about the \$90,000. There is no reason why the money should not be sent as soon as the Great Father has approved what we do.

KAY-ME-WUN-USH. Before I sign you will have the papers ready for us that you said you would leave with us. We had intended that our mixed-blood there should take a copy of that. My friends, we shall not be the first to touch the pen. You must touch the pen as commissioners first. That is what the people think who will sign. You said that you will do as you think proper. If there is anything in the paper that you leave with us which should not be fulfilled I shall feel badly. My friends, I hope you will take no offense at what I have said.

SHE-NING-GO-GOWN. My friend [Mr. Rice], do you recognize me when you look at me? My friend, I saw you at the old place. You and I were young men when we met there. I can not recognize you on account of your age—you looked so young when I saw you. That is my queen that is sitting there. I am the man that stood by the head chief Flat Mouth when you borrowed that land from me. I stood right by his side. When he got up he said, "Get up and stand by my side when I am talking with him." The man [indicating Paul H. Beaulieu] knows me well, and it is well known that I was the supporter of my chief while he was living. When you borrowed that land from my old friend Flat Mouth, you told him that you would pay him five years, but you did not stop on the fifth year; you paid him six times instead of five. You told him that you wanted to put the Menomonies there, but they were not put there. You told my old chief that when the Menomonies were well settled there—if I recollect right, you said, "You will then have what your land is worth." My friend, I have not heard what price they asked you for that land. It was our Great Father that sent you here at that time. My friend, I wish to say that I do not wish to put any obstacles in the way of this new arrangement that your Great Father sends you here to achieve.

Mr. RICE. I was glad, not only to see but to hear your old warrior. I remember well my first arrival at the old

fort here. I was greeted, before the boat touched the shore, by guns. They had in them more than powder; they had bullets in them. I know at that time that they were all warriors and all great hunters, and I knew they were friendly bullets, for none of them hit me. I witnessed there, at that time, a scalp dance, the scalps having been taken from the Sioux. I did not ask who brought them, but they were many. I do not know but our old friend here brought them, for he brought a great many. I remember well his being the friend and supporter of Flat Mouth. He stood by the chief's side all the time I was here. It makes me feel young to again meet him, as it carries me back to the time when we first met. I hope the Master of Life will spare us both until the work we have begun now is finished, and if so, our last meeting will be as pleasant as our first one.

WAY-ZOW-WE-GWON-ABE. We have forgotten to mention what might be expected from the tamarack lands. The cedar is a very valuable tree, as well as the tamarack tree, and there is a large amount on this reservation. How is that to be disposed of?

I have always behaved myself and so have a good reputation, and I want to say that heretofore, whenever we have laid anything before the agents, all that they would content us with was promises, the fulfillment of which we have never seen, and it would be better if those promises were never made. If everything had been fulfilled that has been promised to the Indians here you would see this place more prosperous than it is and more advancement, but as you see the place now the whole settlement is in ruin. That is all.

SONG-GE-GE-SHIG. I speak for the Cass Lake Indians who are here, and wish to know if you are going to stop at Cass Lake, stopping on our shores, holding council with us, and having a talk with us.

Mr. RICE. It is our intention to go from here to your village.

SONG-GE-GE-SHIG. We will meet and have a pleasant talk here.

Mr. RICE. I shall be glad to see the old ground again.

KAY-KE-NOW-AUS-E-KUNG. My friend, when do you think you will pay us another visit? Will you bring another secretary when you come again?

Mr. RICE. I expect to bring some one. Whatever business we do will be put down on paper.

KAY-KE-NOW-AUS-E-KUNG. I want to know if you are going to bring more papers to sign.

Mr. RICE. No. The papers for the land will be signed by us.

KAY-KE-NOW-AUS-E-KUNG. I want to know if the signing is stopped when you leave here. If I should not sign at all would you give me anything?

Mr. RICE. Just the same. The only difference would be that you would be eating of a deer that you did not help to kill.

KAY-KE-NOW-AUS-E-KUNG. If I should not sign, would I be allowed to go to Washington?

Mr. RICE. That is a question that I could not answer. Indians are not, however, allowed to go to Washington. I suppose you mean a delegation. The reason is, that Indians have gone there and sold their land, making agreements of which their people knew nothing.

KAY-KE-NOW-AUS-E-KUNG. That is the truth.

Mr. RICE. Your Great Father is determined that no transaction with a band of Indians shall take place hereafter without all of them knowing of it.

KAY-KE-NOW-AUS-E-KUNG. That is right.

Mr. RICE. A great deal of trouble arose from Indians going there and transacting business, which they did not

understand after they got home. The trouble at Mille Lac has been brought on by that very thing. Your Great Father told us to answer all your questions, putting it all on paper to send to him, and to leave nothing untold. He did not wish to hear any complaints hereafter about misunderstanding.

KAY-KE-NOW-AUS-E-KUNG. They are a little ahead of me at Washington, and those are exactly my own views. The reason I ask is, that I have only one child, and I wish to leave a memento for him and prepare him for the future. To-morrow, or day after to-morrow (Monday), we will get all ready for signing. It is not for a long time that I shake hands with you.

WAB-ON-A-ON-NE. I hope you will forgive me for not shaking hands until I get through talking with you. I do not wish any answer to what I am going to say. I get up to beg your indulgence, and that you will not get impatient with us. We have asked a great many questions which would exhaust any one's patience, but we beg you to have still a little more. I say this so that any one can ask questions, and that there may be hereafter no excuse for not understanding this. Have pity on them on account of their ignorance. There are a great many who do not know anything. It is difficult for them to understand, having no perceptive powers. You can see how ignorant they are when they are capable of making the demand that you should raise your hands. This is ignorance, and you must remember it in dealing with them. But the raising of hands impressed every one here. I for one was greatly impressed, and I said, "These men would not raise their hands unless they meant it." That very action opened my eyes, and I saw right before me what was good for my children. I saw the education and progress which civilization brings—I saw that at a glance, after the raising of hands. There are ten of our chiefs who have made up their minds and proclaimed that they would accept the propositions made to them. I have been advising them not

to forget to ask all the questions, as it will assist in a mutual understanding to have them all answered.

Council was then adjourned until 9 o'clock, Monday, August 19, 1889.

TENTH COUNCIL AT LEECH LAKE.

AUGUST 19, 1889.

Mr. RICE. We have the papers promised you on Saturday, and have brought two just alike. The interpreter will make their contents known to you.

(The interpreter read the paper containing a statement of the claims of the Pillager Indians of Leech Lake, after which one copy was given to Ruth Flatmouth, and another to William Bonga, who is designated secretary of the band, and who is told by the Indians present to remember that the paper is not his private property, but must be shown whenever they wish to see it.

Ruth Flatmouth then "touched the pen" to signify that she wished her name appended to the agreement offered by the commissioners, and stated that she wished to say a few words.)

RUTH FLATMOUTH. I wish to say a few words on behalf of my people. I wish to have it understood that you will use your influence so that no spirituous liquors shall come upon this reservation. It is the ruin of a great many of our people. During payments here it takes away the subsistence intended for the children. The money is thrown away for liquor. Not only that, when a man is in debt who has been furnished supplies, he pledges his word that he will pay at the time of the annuity payments, but the debt remains unpaid because of the appetite for liquor.

It is my wish also that I should be buried where my ancestors are buried.

SHING-QWON-A-QUOT. I wish to say, as I sign, that I want my bones to remain on this reservation.

O-GE-MAH (signing). The whole thing has been understood thoroughly to my satisfaction, so that I have nothing to say. But I think the chiefs here should all sign first.

Mr. RICE. We did not understand your arrangement, and you did not speak of it. Let all the chiefs sign first.

(The chiefs then signed in order of rank, the other Indians following them.)

KAY-KE-NOW-AUS-E-KUNG. I wish that there should be a spot selected so that we can make a town of our own, like Brainard, where a town can be laid out for us, not only when payments are made, but to be a central point in winter.

This big point on the other side is the place we would like to reserve, because there is lots of hay there, and it is not very large, either. Maybe the time will come when there will be no common for the cattle, and that will make a good one. It will be beneficial to all. This is an important matter.

Mr. RICE. In regard to the town site, it is supposed that that will be fixed by the agent after deciding where the best place is. Is that satisfactory?

KAY-KE-NOW-AUS-E-KUNG. Yes, sir.

Mr. RICE. That point over there is open to you all. A number of you can take it in allotments.

KAY-KE-NOW-AUS-E-KUNG. It will make good farming land. There is a place there where we can get good pine for ourselves, right opposite this place. It is called Pine Point.

Mr. RICE. Is that the wish of you all?

(The Indians said "yes.")

(Mr. Rice then added a clause to the statement or list of claims, in regard to the land on Pine Point.)

KAY-KE-NOW-AUS-E-KUNG. I want it understood that I am not talking for the Indians who do not wish to comply with the wishes of the Government, but I am talking for those who are signing now.

(Now-we-ge-shig, saying that he does not wish what he says to go into the record, stated that he did not quite know what position he would assume. He called for the chiefs who will sign or have signed, to rise, whereupon eleven chiefs stood up.)

NOW-WE-GE-SHIG. In shaking hands with the Bishop, I shake hands with you all. My friend [Mr. Rice] instead of its being buried in oblivion, we wish you to work for remuneration for the border land—the Leaf River. My friend, we know that when you have anything to do or a point to carry, you are strong and determined in your efforts. My friend, take all these fragments that are troubling us so much, and use your influence to gather them together, so that when you come to see us again, you can open your arms and we can see what your success has been. My friends, if that should not transpire—if you should fail to carry out the object, we should all be very much ashamed—all of us.

Mr. RICE. So shall we be.

NOW-WE-GE-SHIG. My friend, when you return have pity on those who do not sign, instead of being against them.

O-GE-MAH. A great many who were present at the time of which I speak are dead, but it seems to me as if it were transpiring this very day, it has been so strongly impressed upon my mind. There were the whites on one side and the Indians on the other. I felt for both, as I was in the center when there was danger in the situation. At that time the Mississippi Indians were all together to

be blamed. They came very near leading me astray, but the demonstration made was their own doing, not mine. When I saw how the matters were going I took hold and made a stir. The President thanked me that there was no blood spilled there, and it was all owing to my efforts in stopping the raid. My friends, the great chiefs told me that whenever I had a request to make, to make it. You remember that very well.

Mr. RICE. I do.

NOW-WE-GE-SHIG. That is the reason that I beg of you, if any of the chiefs do not sign, do not go from here with a bad heart. So far as I am concerned I do not promise that I will sign, but towards the last I will make up my mind what I will do. My friend, I will say again that we have the utmost confidence in the commissioners. We wish you to work for us so that whenever you come again to visit us you will be able to open your hands and show us the proceeds of your work.

Mr. RICE. We have listened to your words and know that they are correct. I know of the promises made by the President, and all the white men in power know it. Your words are all carefully taken down, to be read throughout the country. When they are printed at Washington we will send copies here, so you will know what has been said.

(Mr. Rice then read the addition made to the list of claims.)

KAY-KE-NOW-AUS-E-KUNG. I am addressing the Pillagers. I signed for the Northwest Commission, and it did not amount to anything. I am now about to sign again, and if this don't amount to anything I would rather be taken and strangled by the neck with a rope. Now what I am going to sign, I hope what I have been told shall come to pass. I hope you will get the two-thirds majority. That is all.

NOW-WE-GE-SHIG. My friend, a great many of my band told me that they would not sign, and I do not own them. You can not imagine how pleased I am with the assurances you have given. I now shake hands with you and sign.

WOB-ON-A-QUAY. I wish to say a few words before signing. I have never joined in anything before that the Pillagers have done, but I am now for you. I have considered the matter thoroughly, and you can depend upon my word. I have a thick skull, but a stout heart, and I do not wish to lie in anything I say. I now sign and shake hands with all the commissioners.

Mr. RICE. We are very glad you have considered this so long. If you had jumped to a conclusion we might have thought you were wrong, but we know now that you are right. That is the way wise men should always do.

Adjourned.

ELEVENTH COUNCIL AT LEECH LAKE.

AUGUST 20, 1889.

NO-DIN-AH-QUAH-UM. There is one thing which has been omitted, but which is essential for the success of the people here in their agricultural pursuits, and that is a boat, a steamer to take cattle or anything else, as otherwise we can not reach those places.

Bishop MARTY. I suppose all those who are here this morning have already signed the document. They have expressed sorrow that there were some who had not done so, and the wish that we should not be angry with those who had not signed, but only pity them. This shows a very good disposition, and we hope it is that of the whole band.

KAY-ME-WUN-USH. After the allotments are made, when an Indian wishes to go anywhere on American soil, will he be allowed to do so?

Mr. RICE. He will be allowed to go anywhere, subject to the same laws as the white man.

KAY-ME-WUN-USH. I speak for every man who has signed the agreement. I do not wish to express any views on behalf of those who have not signed. We wish you [Mr. Rice] would take this into consideration. The Pillagers can get nothing in the early fall for subsistence, and in the beginning of winter the kind of provision that you are furnishing us now is furnished by the traders. We get it by exerting ourselves and get it in trade. Now, how would it be if we should ask our Great Father to fill up our dish at that time? I mean in February, when we start for the sugar bush. It is a very hard time every year, so we wish that another dish full should be given us then.

Mr. RICE. After we got through our work at White Earth so favorably, the agent, at the request of the Indians, wrote to the Great Father to know if he would not allow him to purchase some provisions to enable them to get through the harvest. The Great Father did not wait to write, but sent word over the wires to your agent to purchase the provisions necessary to enable the White Earth Indians to get through their harvest. Does that look as though the Great Father's ears were closed? That is all upon that subject, although you may make known your request to the agent.

WAB-ON-A-NO-NE. I wish to say a few words. It pleases me very much to be able to address the commission. I wish the Pillagers who are here to listen to the few words that I may say, because it will be mainly addressed to my people. Then, as life is very uncertain, it may be the last chance I shall have to talk to the commission, and I hope that whatever I shall say will be received in pity.

As I am a believer in the Master of Life, I shall refer in my remarks a great deal to Him. My friends, you are well aware of what the Master of Life's Son said to the people that He met in this world. It pleased the Master

of Life to create this continent that lies between oceans and which we now inhabit, and it has pleased the Master of Life to send these persons here as a commission to point out to us the right way and how we should live.

Now you can see what ignorance will do. A great many did not even believe the words; did not accept the words uttered by the apostle [Bishop Marty] of the Master of Life; and this is the result of ignorance. You know very well that the presence of Almighty God is everywhere. He is here, before those commissioners, who are paying us a visit. This we are led to believe and do believe. Under those circumstances what have we to fear? We have nothing to fear, because we are guided by the words of the Master of Life, and everything is safe on our side, and the only thing that remains is to have confidence in Him and we shall succeed. Any person here who has not stretched his arm and touched the pen should know that the reason we accept this proposition is because we have confidence in the Master of Life, whom I mention because He holds in His hands all our destinies. It has pleased Him to have me remain on the land on which we were born. That is the way that I feel. They are but a few words, but they are heartfelt.

Commissioner WHITING. Mr. Chairman: "Pillagers, I have only words of kindness and good will to speak to you. I had heard much of you as a people, and had I followed my own inclinations I should have come to you earlier than this, but the plan of our work required that we should begin elsewhere. When our faces were turned towards your beautiful location I was glad.

I had heard that you were a people of dash and courage, with full convictions of what you should do. You are a band which has a history wide as the country. I said that had I followed my own inclinations I should have come to you earlier, but I yielded to the superior wisdom of our chairman, who, by personal intercourse, knew all about you.

I have been greatly and deeply moved by the spirit of kindness you have shown toward our illustrious chairman, and this is eminently right, because all over your history for nearly half a century the name of this man appears as your benefactor. Whether as a member of the Great Council or as a citizen of the country, he has been your friend always. In every book of treaties his name appears as your friend. In all the records of the Great Council, as you turn them over, you find that he was never silent when a word for you could be spoken. So now, when he comes to you to make this last arrangement with you, can you doubt him? I know you can not.

I come to you a stranger, but it is my highest honor to follow the way that he leads in your behalf.

In one of our councils I noticed a young man bearing upon his bosom a medal which had on it the face of the Great Father of 1854. I knew the face of the Father very well, and it brought back to my mind a scene that transpired many years ago in the Great Father's house. Your great chief at that time found that you were in trouble and danger, and he went to Washington to interview the Commissioner at the head of Indian Affairs. He appealed to the Commissioner in vain. This friend of yours [Mr. Rice], who was in the Great Council, heard of it, and he took charge of the matter himself and brought it into the Council. In an almost all-night session the bill was finally passed and ready for the Great Father's approval.

The next morning, in order that the bill might be approved, this Senator, accompanied by the great chief Flatmouth, and other Senators, went to the President's house. The great Flatmouth, after thanking his friend for what he had done, turned to the Great Father and said: "I beg you, sign this bill for the relief of my people." Taking both the Great Father's hands in his, Flatmouth says: "I thank you for the encouragement you give me. Now, when you have signed this bill, give me time to

make my way back to my people. Count the risings and the settings of the sun, and when you think I am there, look into the heavens, and when you shall see the aurora borealis with its gentle light, think that it bears to you the gratitude of the Pillagers for your kindness to them."

During some of the sessions of the councils we have held with you, this scene at the Great Father's house has come back to me with painful clearness, and I have asked myself, "What of this great emblem that your great chief chose to carry the gratitude of your people to your Great Father?" I said, "Shall this gentle light that has been the emblem of the Pillagers, that the President recognizes as the message from the Pillagers, shall it be changed into a flaming tongue of the fire, carrying back to the President only your fierce wrath—this hot flame, that would scorch the face of the Great Father so that he would be forever blind to your wants and your necessities?" If so, what shall his answer be, and how shall it be sent to you? Shall it come to you in the black cloud, laden with thunder? Shall it come to you in the fierce storm that sweeps everything before it? I confess to you when I saw the darkness that for a time surrounded us, I was afraid, and I asked the Great Spirit to show us and you the right way.

But your action has answered all these questions—has swept away the clouds and let in the sunlight of joy and gladness to us all. And so hereafter, as in the past, this beautiful emblem will continue to carry to the Great Father only kindness. And his answers shall all come back to you, borne on the soft breezes that blow from that milder clime.

And so I wish to say to you that we are hopeful of the best. Your prospects for a higher advancement are as good as those of any people. I say to you, as I said to the people at White Earth, it requires courage and perseverance to succeed. The land you have is nothing unless you cultivate it. The money that is coming to you will

be worse than nothing unless you make wise use of it. And now I say to you, as I said to your friends in White Earth, if by any possible mischance you should fail of the highest good which it is possible for you to receive, no one will regret it so much as the members of this Commission. We have lifted our hands toward the Great Spirit and said that we mean every word that we had spoken to you. And I raise my hand again and renew the pledge, that no effort on my part shall be withheld for your best good.

And now one word to your queen, who has come into these councils day by day. I charge you that after the interest she has manifested in your welfare, as the representative of a great chief, I charge you to see that no harm shall come to her. I beg you to see that no want of her's goes unsupplied if it is in your power to supply it. Ruth Flatmouth, noble daughter of a noble chieftain! I ask the Great Spirit that her bark may be gently borne to the farther shore. Pillagers, I bid you a kindly farewell.

* * * *

13

Supreme Court, U.S.
FILED
JAN 13 1998
CLERK

No. 97-174

In The
Supreme Court of the United States
October Term, 1997

CASS COUNTY, MINNESOTA; SHARON K. ANDERSON, in her official capacity as Cass County Auditor; MARGE L. DANIELS, in her official capacity as Cass County Treasurer; STEVE KUHA, in his official capacity as Cass County Assessor; JAMES DEMGEN, in his official capacity as Cass County Commissioner; GLEN WITHAM, in his official capacity as Cass County Commissioner; ERWIN OSTLUND, in his official capacity as Cass County Commissioner; VIRGIL FOSTER, in his official capacity as Cass County Commissioner,

Petitioners,

v.

LEECH LAKE BAND OF CHIPPEWA INDIANS,
Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Eighth Circuit

BRIEF FOR AMICUS CURIAE LUMMI INDIAN TRIBE

Office of the
Reservation Attorney
JUDITH K. BUSH
2616 Kwina Road
Bellingham, WA 98226
(360) 384-2258

RAAS, JOHNSEN & STUEN, P.S.
HARRY L. JOHNSEN, III
1503 E Street
P.O. Box 5746
Bellingham, WA 98227
(360) 647-0234
Counsel of Record
for Lummi Indian Tribe

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

9/4/97

QUESTION PRESENTED

Is freely alienable land owned by a tribal government within its own reservation subject to state taxation merely because the tribe has the ability to sell the land, or is an unmistakably clear congressional grant of taxing jurisdiction also required?

TABLE OF CONTENTS

	Page
I. INTEREST OF <i>AMICUS CURIAE</i>	1
II. SUMMARY OF ARGUMENT	3
III. ARGUMENT	5
A. <i>The Kansas Indians</i> Established the Basic Principle that a State is Without Jurisdiction to Tax Indian Property Within a Reservation For Two Independent Reasons..	5
B. The Decision in <i>Goudy</i> Dealt Only With the Removal of Statutory Restrictions; Jurisdiction to Tax was Conceded	12
C. This Court's Decision in <i>Yakima</i> Reaffirmed Basic Jurisdictional Principles Which Bar State Taxation of Tribal Lands in the Absence of Unmistakably Clear Congressional Intent and Did Not Equate Alienability With Taxability.....	19
IV. CONCLUSION	22

TABLE OF AUTHORITIES

	Page
CASES:	
<i>Blue Jacket v. Commissioners of Johnson County</i> , 72 U.S. (5 Wall.) 737 (1867).....	5, 6, 7, 8, 10, 14, 16
<i>Bryan v. Itasca County</i> , 426 U.S. 373 (1976).....	7, 18, 20
<i>Choate v. Trapp</i> , 224 U.S. 665 (1912)	14, 17, 20
<i>County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation</i> , 502 U.S. 251 (1992)	2, 4, 19, 20, 21, 22
<i>Elk v. Wilkins</i> , 112 U.S. 94 (1884).....	13
<i>Goudy v. Meath</i> , 203 U.S. 146 (1906)	<i>passim</i>
<i>Goudy v. Meath</i> , 38 Wash. 126, 80 P. 295 (1905)	12
<i>In re Heff</i> , 197 U.S. 488 (1905)....	5, 12, 14, 15, 16, 17, 18
<i>Jones v. Meehan</i> , 175 U.S. 1 (1899)	15
<i>The Kansas Indians</i> , 72 U.S. (5 Wall.) 737 (1867)	4, 5, 8, 10, 12, 13
<i>Leech Lake Band of Chippewa Indians v. Cass County, Minn.</i> , 108 F.3d 820 (8th Cir. 1997).....	2
<i>Lummi Indian Tribe v. Whatcom County</i> , 5 F.3d 1355 (9th Cir. 1993), <i>cert. denied</i> , 512 U.S. 1228 (1994) ...	1, 2
<i>Mattz v. Arnett</i> , 412 U.S. 481 (1973)	19
<i>McClanahan v. State Tax Commission of Arizona</i> , 411 U.S. 164 (1972)	7, 11
<i>Mesaclero Apache Tribe v. Jones</i> , 411 U.S. 145 (1972)	12
<i>Moe v. Confederated Salish and Kootenai Tribes</i> , 426 U.S. 463 (1976)	7, 18, 19
<i>Montana v. Blackfeet Tribe</i> , 471 U.S. 759 (1985).....	7

TABLE OF AUTHORITIES – Continued

	Page
<i>The New York Indians</i> , 72 U.S. (5 Wall.) 761 (1867)	5
<i>Oklahoma Tax Comm'n v. Chickasaw Nation</i> , 515 U.S. 450 (1995)	4, 7, 22
<i>Oklahoma Tax Comm'n v. Sac and Fox Nation</i> , 508 U.S. 114 (1993)	7, 9, 14
<i>Pennock v. Commissioners</i> , 103 U.S. 44 (1880)	9, 12
<i>United States v. Celestine</i> , 215 U.S. 278 (1909)	17
<i>United States v. Nice</i> , 241 U.S. 591 (1916)	12, 18
<i>United States ex rel. Saginaw Chippewa Indian Tribe v. Michigan</i> , 106 F. 3d 130 (6th Cir. 1997), petition for cert. filed, 66 U.S.L.W. 3085, (U.S. June 30, 1997) (No. 97-14)	2, 22
<i>Wan-zop-e-ah v. Commissioners of Miami County</i> , 72 U.S. (5 Wall.) 759 (1867)	8, 13, 21
<i>Yellow Beaver v. Commissioners of Johnson County</i> , 72 U.S. (5 Wall.) 757 (1867)	5, 6, 8
STATUTES:	
10 Stat. 1132	14
12 Stat. 927 (1855)	1
25 Stat. 641, Nelson Act of 1889, ch. 24	1
25 U.S.C. §§ 331-334, 339, 341, 348, 349, 354, and 381	1, 3, 20
25 U.S.C. § 461 et seq., Indian Reorganization Act, 48 Stat. 984	18

I. INTEREST OF AMICUS CURIAE¹

The Lummi Indian Tribe holds fee title to lands within the Lummi Reservation which were originally assigned to Tribal members pursuant to the Treaty of Point Elliott.² The Tribe has acquired these lands through various means from successors-in-interest of the original assignees, including both Tribal member and non-Indian successors.

Most of the Treaty-based assignments were made in 1884, three years before Congress enacted the General Allotment Act.³ The purpose of the assignments was to provide permanent homes for the Indians. Article VI of the Treaty. No explicit provision for eventual state taxation of these assignments was included in the Treaty, nor has Congress subsequently clearly expressed an intent that these lands be subject to state taxation.

Nevertheless, the Ninth Circuit Court of Appeals concluded in *Lummi Indian Tribe v. Whatcom County*, 5 F.3d 1355 (9th Cir. 1993), cert. denied, 512 U.S. 1228 (1994), that the Tribe's fee lands are subject to county *ad valorem* taxes

¹ Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amicus* and its counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' consents have been filed with the Clerk.

² The Treaty was signed on January 22, 1855 and ratified by Congress in 1859. 12 Stat. 927 (1855).

³ Act of February 8, 1887 codified at 25 U.S.C. §§ 331-334, 339, 341, 348, 349, 354, and 381.

based on its reading of *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992). The majority opinion in *Lummi* acknowledged that its conclusion was "hard to square with the requirement, recently approved by the *Yakima Nation* Court, that Congress' intent to authorize state taxation of Indians must be unmistakably clear", 5 F.3d at 1358, but interpreted *Yakima* as holding Indian "land is taxable if it is alienable," *id.*, largely because of *Yakima's* reliance on *Goudy v. Meath*, 203 U.S. 146 (1906). In dissent, Judge Beezer wrote that the majority "misses the point" and that *Yakima* "did not ignore how the land was allotted; the method of allotment is crucial in federal Indian law." *Lummi*, 5 F.3d at 1360.

The Sixth and Eighth Circuits have interpreted the decision in *Yakima* as confirming the fundamental Indian law principle that Congress must make it unmistakably clear that it intends Indian lands to be taxed by states. In *Yakima*, this Court found that a 1906 amendment to the General Allotment Act expressly permitted state taxation of allotments patented under that Act. In the case now before the Court, the Eighth Circuit could not find an unequivocal congressional intent that lands allotted pursuant to specific sections of the Nelson Act of 1889, ch. 24, 25 Stat. 641, would be subject to state taxation. *Leech Lake Band of Chippewa Indians v. Cass County, Minn.*, 108 F.3d 820 (8th Cir. 1997). In the same year, the Sixth Circuit held that lands allotted under treaty provisions which, like the Treaty of Point Elliott, pre-dated the General Allotment Act are not subject to state taxation. *United States ex rel. Saginaw Chippewa Indian Tribe v. Michigan*, 106 F. 3d 130 (6th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3085,

(U.S. June 30, 1997) (No. 97-14). Both circuits rejected the Ninth Circuit's conclusion that "alienability equals taxability." Indeed, the *Saginaw* court concluded that the Ninth Circuit improperly relied on *Goudy v. Meath*, 203 U.S. 146 (1906), instead of properly relying on the full reasoning of the *Yakima* decision. 106 F.3d at 134.

This conflict between the Circuits is now before the Court for resolution. The Lummi Nation generally endorses the arguments of Respondent and submits this brief to focus particular attention on the *Goudy* decision in both its historical context and in light of the actual record in that case. The Ninth Circuit's and now Cass County's attempts to elevate *Goudy* to controlling status exalt a minor, routine statutory construction case above an unbroken line of principled cases which form the doctrinal heart of federal Indian law.

II. SUMMARY OF ARGUMENT

The law has always recognized two independent barriers to state taxation of Indian land: a federal common law jurisdictional barrier premised on the political status of Indian tribes and location of their land within a reservation, and a property rights barrier based on specific statutory or treaty language which applies regardless of the location of the land. By clear and explicit legislation Congress may remove either or both of these barriers. But removal of one barrier does not affect the other unless Congress specifically so provides.

A patent issued under the General Allotment Act, 25 U.S.C. § 349, removes both barriers. Congress specifically directed that after the issuance of the fee patent "all

restrictions as to sale, incumbrance, or taxation of said land shall be removed." This language simultaneously removes the restraints on alienation and affirmatively authorizes taxation of the particular parcel of land involved without authorizing any other exercise of state jurisdiction over the land or its owner. *Yakima*, 502 U.S. at 264. Merely removing the restraints on alienation of land does not have that effect. In the present case no language comparable to § 349 grants jurisdiction to the state or exposes tribal fee lands to taxation.

Goudy v. Meath does not hold that "alienability equals taxability" except in the very narrow situation where the restraint on alienation is the sole barrier to taxation. That was the case in *Goudy*, which involved an Indian who had severed his tribal relations, become a citizen and conceded that he was subject to state law. It is not generally the case with tribal land located within an established Indian reservation. *Goudy* should not be expanded beyond its unique facts nor considered outside of its historical context and the arguments it involved.

Goudy was not a jurisdictional case; it was a property rights case. In an unbroken string of cases from *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867) through *Yakima* and *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995), the Court has held that Indian property located on a reservation is not subject to state taxing jurisdiction in the absence of an explicit congressional grant. In *Goudy* the state's taxing jurisdiction was conceded. Consequently, the Court considered only the effect of removing the restrictions on his property. Neither *Goudy* itself nor the Court's treatment of it in *Yakima*

supports the view that alienability equals taxability in the absence of a grant of jurisdiction.

III. ARGUMENT

A. *The Kansas Indians* Established the Basic Principle that a State is Without Jurisdiction to Tax Indian Property Within a Reservation For Two Independent Reasons.

The established law on the taxability of tribal lands at the time of *Goudy v. Meath*, 203 U.S. 146 (1906), was embodied in the landmark cases *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867) and *The New York Indians*, 72 U.S. (5 Wall.) 761 (1867). These cases hold that there are two independent sources for the tax exemption, one based on tribal political status and the location of land on a reservation, and one based on property restrictions. While both protections may be present in any given case, either is sufficient to exempt the land from tax. If one protection is removed, the other is unaffected. *Goudy* did not alter those cases; it was premised on them. They remain the law today.

The Kansas Indians actually involved three separate but similar cases. The decisions in these cases established basic principles of law from which the Court has never varied. The central focus of the Court's analysis in the first two of the three cases, *Blue Jacket v. Commissioners of Johnson County*, 72 U.S. (5 Wall.) 737 (1867), and *Yellow Beaver v. Commissioners of Johnson County*, 72 U.S. (5 Wall.) 757 (1867), was on jurisdiction, not on "mere property rights [which] do not affect the civil or political status of the allottees", *In re Heff*, 197 U.S. 488, 509 (1905), but

which might also support a tax exemption. The Court held that a state was without jurisdiction to tax Indian property within a reservation, regardless of the status of the title to the property.

Blue Jacket involved the Shawnee Tribe which, under a series of treaties, had been removed from their aboriginal lands to a reservation in Kansas. The government divided a portion of the reservation lands among the tribal members, and the tribe held title to the remainder. The facts in *Yellow Beaver* were similar. In neither case was there an express exemption from state taxation in any of the treaty language.

Kansas conceded that it could not tax the tribal lands, but contended that individual lands could be taxed. 72 U.S. (5 Wall.) at 755. The Court mentioned the fact that the individuals held fee title subject to a restriction on alienation, but this fact played no part in the analysis of the case. 72 U.S. (5 Wall.) at 753. The holding was based purely on the location of the land on the reservation, the continuing political existence of the tribe, and the continued political relationship between the tribe and its members. In a fundamental and oft-cited explication of federal Indian law the Court held:

If the tribal organization of the Shawnees is preserved intact, and recognized by the political department of the government as existing, then they are a "people distinct from others," capable of making treaties, separated from the jurisdiction of Kansas, and to be governed exclusively by the government of the Union. If under the control of Congress, from necessity there can be no divided authority. If they have outlived

many things, they have not outlived the protection afforded by the Constitution, treaties, and laws of Congress. It may be, that they cannot exist much longer as a distinct people in the presence of the civilization of Kansas, "but until they are clothed with the rights and bound to all the duties of citizens," they enjoy the privilege of total immunity from State taxation. . . . There is no evidence in the record to show that the Indians with separate estates have not the same rights in the tribe as those whose estates are held in common. . . . Conferring rights and privileges on these Indians cannot affect their situation, which can only be changed by treaty stipulation, or a voluntary abandonment of their tribal organization. As long as the United States recognizes their national character they are under the protection of treaties and the laws of Congress, and their property is withdrawn from the operation of State laws.

Blue Jacket, 72 U.S. (5 Wall.) 737, 755-57 (emphasis added). This is one of the earliest statements of the rule requiring congressional grants of taxing jurisdiction in Indian country to be clear and explicit. This Court has repeated and applied this fundamental principle in numerous cases. See, e.g., *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1972), *Moe v. Confederated Salish and Kootenai Tribes*, 426 U.S. 463 (1976), *Bryan v. Itasca County*, 426 U.S. 373 (1976), *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985), *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114 (1993), *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995).

The Court applied the same reasoning to the second and third *Kansas Indians* cases, *Yellow Beaver*, *supra*, (involving the Wea Tribe) and *Wan-zop-e-ah v. Commissioners of Miami County*, 72 U.S. (5 Wall.) 759 (1867), (involving the Miami Tribe). But, in the Miami case, an additional basis for exemption was found:

There is, however, one provision in the Miami treaty – being in addition to the securities furnished the Shawnees and Weas – which, of itself, preserves the Miami lands from taxation. This particular provision exempts the lands from “levy, sale, execution, and forfeiture.”

72 U.S. (5 Wall.) at 760. The Court held that the exemption from levy, sale and forfeiture was inherently an exemption from taxation as well, because taxes are levied and then collected through forfeiture and sale proceedings. 72 U.S. (5 Wall.) at 761.

That these are two independently sufficient grounds for tax exemption could not be made more clear. One is based on political status; one on a property restriction. In *Blue Jacket* and *Yellow Beaver* there was no exemption language, yet the Court found that state taxation was incompatible with tribal status. The laws of Kansas could not be applied to tribal Indians whose property was located within their reservation.

In *Wan-zop-e-ah*, the Court relied on the treaty exemption language as an additional ground for its decision, which “in itself” preserved the lands from taxation. This exemption would apply regardless of the location of the

land or the status of the owner as long as the terms of the exemption remained in effect.⁴

Because there are two independent grounds for exemption, not every Indian tax case discusses them both. Indeed, most cases have been decided on the tribal status ground alone, and the Court has formulated their holdings into a *per se* rule which presumes against the existence of state taxing power where the property is located on a reservation and tribal status exists. *Oklahoma Tax Comm’n v. Sac and Fox Nation*, 508 U.S. 114, 128 (1993).

Explicit restrictions against taxation provide a second line of defense. In a small number of cases they are the only defense, typically because the property is located outside a reservation or because the owner can no longer claim Indian status. As is explained more fully below, *Goudy v. Meath* falls into this latter category. In those cases, the litigation focuses on the effect of the restrictions or the consequences of their removal in the context of acknowledged state jurisdiction.

For example, in *Pennock v. Commissioners*, 103 U.S. 44 (1880), the Court addressed the situation of an Indian woman who remained behind when her tribe was removed to a reservation in a different state. The old reservation was abolished and the restrictions on her land had expired. Because she still maintained a relationship with her tribe, she argued that her land could not be

⁴ The Court did not focus on the restraints on alienation, although those restraints would logically provide a third basis for prohibiting taxation, since the result of non-payment of real estate taxes is an involuntary sale of the land.

taxed. In concluding that she was not entitled to a tax exemption, the Court undertook a two-step analysis. First, it noted that she held unrestricted fee title to her land and could not claim an exemption on that ground. Then it distinguished *The Kansas Indians* on the basis of political status. Her land was not located on a reservation. In the absence of a restriction on her title, her decision to separate herself from her tribe was fatal to her claim of Indian status:

She might have followed her tribe – she can now do it; but as that tribe, under a treaty with the United States, has left the State, while she remains, and has taken, not an imperfect title, to be held under the guardianship of the Secretary of the Interior, to be disposed of only to the United States, under regulations to be prescribed by him, but a title carrying with it absolute ownership, with a right of free disposition at her will, she and her property have come under the control of the State, and are subject to its laws, entitled to its protection, and bound to bear a portion of its burdens.

103 U.S. at 48.

Distinguishing the situation of the Shawnee patent holders in *Blue Jacket* from that of Mrs. Pennock, the Court held:

Their tribal organizations continuing in the State, and the United States treating with them as distinct political communities, the legislature of Kansas could not interfere with their lands or the lands of individual members of the tribes, and subject them to taxation.

103 U.S. at 49.

The Shawnees, regardless of the state of their title, could not be taxed by the state because of their political status and the location of their land on a reservation. Mrs. Pennock, on the other hand, could not claim that her tribal organization continued within the state. Her tribe had been removed to Oklahoma. Their reservation no longer existed in Kansas. Although still a member of her tribe, she was outside their reservation with no federal restrictions or exemptions applicable to her land. Her land was taxable. This was the law at the time *Goudy* was decided and it remains the law today.

Nearly a century later the Court would summarize an unbroken string of similar cases and analysis in the context of a tribal claim for an off-reservation tax immunity:

[I]n the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and *McClanahan v. State Tax Commission of Arizona*, *supra*, [411 U.S. 164 (1972)] lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent.

But tribal activities conducted outside the reservation present different considerations. . . . Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State.

Mesaclero Apache Tribe v. Jones, 411 U.S. 145, 148-49 (1972) (citations omitted)

This is precisely the holding in *Pennock* and in *The Kansas Indians*. It is also the analysis the Court used in *Goudy v. Meath* to conclude that unrestricted land belonging to an Indian who had severed his tribal relations and become a citizen was subject to taxation. *Goudy* and *Pennock* are similar cases, but neither is authority for taxing tribally owned fee land located within a recognized Indian reservation in the absence of unmistakably clear congressional consent.

B. The Decision in *Goudy* Dealt Only With the Removal of Statutory Restrictions; Jurisdiction to Tax was Conceded.

Goudy involved only property restrictions. The landowner in *Goudy* was an Indian who was "formerly a member of the Puyallup tribe" who had "entirely severed his tribal relations" and become an American citizen. See, *Goudy v. Meath*, 38 Wash. 126, 127, 80 P. 295, 296 (1905). His sole claim to a tax exemption was founded on a restraint on his property rights which the government had recently removed. Although ethnically an Indian, under the short-lived law of the day he no longer had the legal status of an Indian and was fully subject to state law, including the tax laws. *In re Heff*, 197 U.S. 488 (1905); *overruled*, *United States v. Nice*, 241 U.S. 591 (1916).⁵

⁵ *Heff* is the only case cited in *Goudy*. It held that citizenship was incompatible with Indian status, but the holding lasted only eleven years. In 1916 the Court explicitly overruled *Heff*.

Goudy conceded he was subject to state law and that his land was taxable if the exemption from levy, sale and forfeiture had been removed.⁶ Brief of Plaintiff in Error, James Goudy, p. 8, reproduced at App. 42 (Hereafter "Goudy Brief").

The Court was not called upon to rule on any other issue and it made no other ruling. It certainly did not reverse *The Kansas Indians* trilogy or call into question any of their doctrinal underpinnings. *Goudy* himself argued that *Blue Jacket* was inapplicable to his situation because, unlike the Shawnees, he was subject to state law. *Goudy* Brief at p. 14, App. 48. He relied only on *Wan-zop-e-ah*, the Miami case which held that an exemption from levy, sale and forfeiture provided a basis for tax exemption independent from the tribal political status he no longer held. *Goudy* Brief, at p. 8, App. 42.

As revealed by the record in *Goudy*, the facts of the case were these: James Goudy was made a citizen by Section 6 of the Act of February 8, 1887, because he had received a patent under a prior treaty.⁷ Under the ruling

concluding that it had misinterpreted congressional intent in granting citizenship to allottees, 241 U.S. at 601, and that Congress did not intend to subject allottees to state law until the reservations were finally abolished. This, of course, has never occurred. See discussion at pages 17-19, *infra*.

⁶ The relevant portions of the record on appeal and the parties' briefs in *Goudy* are reproduced in the Appendix to this brief.

⁷ In *Elk v. Wilkins*, 112 U.S. 94 (1884), the Court ruled that an Indian who had voluntarily severed his tribal relations and "taken up the habits of civilized life" was still not entitled to United States citizenship, notwithstanding the Fourteenth

in *Heff*, he was then "clothed with the rights and bound to all the duties of citizens," *Blue Jacket*, 72 U.S. (5 Wall.) at 756, and he no longer enjoyed "the privilege of total immunity from State taxation." *Id.* His sole defense was the exemption from levy, sale or forfeiture found in his restricted fee patent. The Court held that when the restrictions on his patent expired, the immunity from taxation also expired, and, since he was a full citizen with no other claim to a tax exemption, his land became taxable.

Significantly, the Court analyzed the tax exemption claim entirely in terms of ordinary tax legislation construction: Tax exemptions will not be implied and the burden is on the taxpayer to demonstrate their existence.⁸ The canons of construction in Indian cases, so eloquently

Amendment's grant of citizenship to "all persons born or naturalized in the United States, and subject to the jurisdiction thereof." The Court ruled that Congress must affirmatively grant citizenship to Indians who had renounced their tribal membership. In 1887 Congress passed Section 6 of the General Allotment Act which unilaterally granted citizenship to all Indians to whom land had been patented in severalty, under either that statute or "any prior statute or treaty". James Goudy had received a restricted fee patent in 1884 pursuant to the provisions of the Treaty of Medicine Creek, 10 Stat. 1132, and he automatically became a citizen in 1887.

⁸ "[T]he tradition of Indian sovereignty requires that the rule be reversed when a State attempts to assert tax jurisdiction over an Indian tribe or tribal members living and working on land set aside for those members." *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 124 (1993); see also, *Choate v. Trapp*, 224 U.S. 665, 674-75 (1912).

restated by the Court only seven years earlier in *Jones v. Meehan*, 175 U.S. 1 (1899),⁹ are nowhere mentioned in *Goudy*. Why? Because at the time an Indian who had become a citizen could not claim "Indian" rights. *Heff*, *supra*.

Goudy himself conceded this point from the beginning of the case through his arguments to this Court. In his complaint he alleged that he was "a citizen of the United States, and entitled to all of the rights, privileges, and immunities of such citizens." Transcript of Record, *Goudy v. Meath*, p. 4, App. 9 (Hereafter "Goudy Record"); see also Agreed Statement of Facts at Goudy Record, pp. 10-18, App. 20-34 especially p. 14, section 7, App. 26. Mr.

⁹ In *Meehan*, 175 U.S. at 10-11, the Court held:

In construing any treaty between the United States and an Indian tribe, it must always . . . be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians. (citations omitted)

Goudy further stipulated "[t]hat the Indians residing upon said reservation have entirely abandoned all their tribal customs and manners; they have and recognize no chiefs, headmen or other tribal authority. . . ." Goudy Record at p. 18, App. 34.

Because of his citizenship Mr. Goudy specifically disclaimed reliance on *Blue Jacket* in his brief to this Court:

No great light is thrown upon the case at bar by the consideration of the adjudged cases. The circumstances surrounding each case which counsel for plaintiff in error has been able to find, are in at least some particulars so different from the facts in this case, as to render the case of but little value as authority. The case of *Blue Jacket vs. Commissioners*, 5 Wallace, Law. Ed., Book 18, page 667, is perhaps the leading case on the subject. In that case the facts were quite similar in some respects, viz, the land had been allotted in severalty; the Indians lived among the whites; and their tribal customs (as actually observed) had been much broken into. *But the decision was placed upon the ground that the tribal relation actually existed, which renders it of no value as an authority in this case.*

Goudy Brief, p. 14, App. 48 (emphasis added). See also Brief of Defendant in Error, p. 13, App. 63. ("Neither is the case of the Kansas Indians in point because those lands belonged to tribal Indians; Indians who have never severed their tribal relations. . . .")

Mr. Goudy's concession on the effects of citizenship on Indian rights was at least superficially consistent with the law of the day, *see Heff*, but that law changed rapidly after *Goudy* was decided, and it was explicitly overruled

only ten years later. In *Heff*, the only case cited by the Court in *Goudy*, the Court ruled that the unique federal jurisdiction over Indian affairs could not be applied to an Indian who had severed his tribal relations and become a citizen. *Heff* involved the prosecution of a white man for selling liquor to an Indian in violation of the Indian liquor laws. The Indian, one John Butler, had renounced tribal membership and become a citizen. The Court held that since he was a citizen and not a "tribal Indian", Congress could not make it a crime to sell liquor to him. 197 U.S. at 509.

The Court soon re-examined this premise, however. In 1909 the Court held that a Tulalip Indian who had received a patent under a treaty provision identical to the one in *Goudy* could be prosecuted in federal court for murder occurring on a reservation notwithstanding the fact that he was a citizen. *United States v. Celestine*, 215 U.S. 278 (1909). In 1912 the Court held that a statutory restraint on alienation was legally separable from a statutory tax exemption, the former being a burden and the latter a benefit. *Choate v. Trapp*, 224 U.S. 665, 673 (1912). The benefit was a property right which could not be taken away without compensation under the due process clause. 224 U.S. at 678. This conclusion called into question even the statutory construction holding in *Goudy* that removal of the alienation restraint also removed the exemption from levy, sale and forfeiture on which the tax exemption was based.

Finally, in 1916, on facts virtually identical to those in *Heff*, the Court explicitly overruled that case. "[A]fter re-examining the question in the light of other provisions in

the [General Allotment] act, and of many later enactments, clearly reflecting what was intended by Congress, we are constrained to hold that the decision in that case is not well grounded, and it is accordingly overruled." *Nice*, 241 U.S. at 601.

Since the decision in *Nice* it has been clear that Indian legal status and citizenship are not mutually exclusive, and that state jurisdiction is not extended over reservation Indians by virtue of their citizenship. See, e.g., *Moe v. Confederated Salish and Kootenai Tribes*, 426 U.S. 463 (1976); *Bryan v. Itasca County*, 426 U.S. 373 (1976).

Not only did the Court itself repudiate its holding on the effects of citizenship, in 1934 Congress explicitly repudiated the allotment policy which had formed the underpinnings of the *Heff* decision. Indian Reorganization Act, 48 Stat. 984, now amended and codified as 25 U.S.C. § 461 et seq. See also, *Bryan*, 426 U.S. 373, 388 n. 14 ("[C]ourts 'are not obliged in ambiguous instances to strain to implement (an assimilationist) policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship.'") (citation omitted). As a consequence, any Indian case decided in the decade between *Heff* and *Nice* must be carefully examined for its jurisdictional assumptions.

It may be true that Congress envisioned the *eventual* elimination of Indian Reservations and the application of state law to Indian people when it passed the General Allotment Act in 1887. But that vision, if it existed, was not self-executing. It depended on additional, future legislation that was never passed. As the Court definitively

held in *Mattz v. Arnett*, 412 U.S. 481 (1973), the policy of the General Allotment Act "was to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing. When *all* the lands had been allotted *and* the trust expired, the reservation *could* be abolished." 412 U.S. at 496 (emphasis added)

In rejecting a claim that *Goudy* represented a major jurisdictional shift giving states jurisdiction over Indian owned fee lands, the Court later held: "If the General Allotment Act itself establishes Montana's jurisdiction as to those Indians living on 'fee patented' lands, then for all jurisdictional purposes, civil and criminal, the Flathead Reservation has been substantially diminished in size." *Moe v. Confederated Salish and Kootenai Tribes*, 426 U.S. 463, 478 (1976). Clearly, *Goudy* fails as authority for such a sweeping change in federal Indian law jurisprudence.

C. This Court's Decision in *Yakima* Reaffirmed Basic Jurisdictional Principles Which Bar State Taxation of Tribal Lands in the Absence of Unmistakably Clear Congressional Intent and Did Not Equate Alienability With Taxability

In *Moe* the issue was whether the state could tax freely alienable personal property owned by Indians residing on fee land within the reservation. The Court held it could not because there had been no unmistakably clear grant of taxing authority over personal property, and the General Allotment Act itself did not provide that authority.

Building on that ruling the Yakima Tribe argued that reservation fee lands were likewise exempt. However, in *Yakima* this Court found an explicit congressional reference to taxation of lands patented under the General Allotment Act. 502 U.S. at 264. This satisfied the "unmistakably clear intent" test which the Court affirmatively restated and applied as the rule of decision in the case. 502 U.S. at 258.

The *Yakima* Court also discussed *Goudy* and noted that when Mr. Goudy's land became alienable it also became taxable. 502 U.S. at 263. As demonstrated above, that statement was correct in *Goudy* because he was already fully subject to state law, and only the restraint on alienation stood between him and taxation of his land. Mere removal of the restraint on alienation does not eliminate the otherwise applicable jurisdictional barrier to state taxation of Indian property unless the language of the removal also includes a grant of jurisdiction. The Court found such language in the Burke Act in *Yakima*.

What sets *Yakima* apart from other Indian tax cases is the limited dual purposes served by the statutory language involved. In most cases there is either a direct grant of jurisdiction, e.g., *Bryan*, 426 U.S. 373 (broad criminal and limited civil adjudicatory jurisdiction under P.L. 83-280) or a specific alteration of property rights and restrictions, e.g., *Choate*, 224 U.S. 665. The Burke Act, as construed by the Court in *Yakima*, in one brief phrase authorized both the removal of property restrictions and the extremely limited grant of jurisdiction to tax the particular parcel involved: "[T]hereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed." 25 U.S.C. § 349. As the Court noted, this was

not a grant of full plenary jurisdiction to the state or even full taxing jurisdiction. "The short of the matter is that the General Allotment Act explicitly authorizes only 'taxation of . . . land,' not 'taxation with respect to land,' 'taxation of transactions involving land,' or 'taxation based on the value of land.'" 502 U.S. at 269. The *Yakima* Court reaffirmed that explicit authorization is required. 502 U.S. at 258 (citing numerous cases).

Cass County argues that because the Court in *Yakima* observed that the *Goudy* Court found the alienability of the lands to be of "central importance", alienability automatically equates to taxability in all cases. This is incorrect. As demonstrated above, the reason alienability was central to *Goudy* is that the landowner conceded he was already subject to all state laws, including the tax laws. Indeed, the *Yakima* analysis begins its discussion of *Goudy* noting that, under the law of the day, Mr. Goudy's property was subject to all state laws, including the tax laws. 502 U.S. at 259-260. It was against that background that the Court discussed the effects of removal of the restraints on alienation.

While it was possible for Congress to exempt Indian property from taxation, even if it was otherwise subject to state law, see *Wan-zop-e-ah*, the *Goudy* Court required that exemption to be clearly stated because it would override normally applicable state law. The *Yakima* Court agreed. In other words, once general state jurisdiction is established, the burden is on the taxpayer to demonstrate the exemption. A restraint on alienation is sufficient to provide the exemption, but if state jurisdiction exists, removal of that restraint removes the tax exemption because the tax laws already apply to the property. If

state jurisdiction is lacking, however, removing a restraint on alienation will not confer jurisdiction. There must be an explicit grant of jurisdiction, such as the Burke Act, either contemporaneously with the removal or at some other time. 502 U.S. at 264. No such grant exists here.

IV. CONCLUSION

The *Yakima* ruling was accurately interpreted and applied by the Eighth Circuit Court of Appeals in this case, and by the Sixth Circuit Court of Appeals in *Saginaw*. Only the Ninth Circuit Court of Appeals in *Lummi* has failed to correctly apply *Yakima*, and even there the majority found its decision "hard to square" with the requirement that congressional intent be made unmistakably clear.

The requirement of unmistakable clarity in congressional intent to grant taxing jurisdiction over Indian land has been consistently and uniformly applied from *The Kansas Indians* through *Yakima* and including the Court's most recent Indian tax decision in *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450. That clear intent was conceded in *Goudy* where the plaintiff stipulated that he and his land were subject to state jurisdiction, relying only on a claimed incomplete removal of restrictions to exempt his land from tax. The Court has never held that alienability equals taxability unless state jurisdiction was also present. It should not overrule one hundred and

thirty years of consistent precedent to reach that result now. The Eighth Circuit should be affirmed.

Respectfully submitted,

Office of the
Reservation Attorney
JUDITH K. BUSH
2616 Kwina Road
Bellingham, WA 98226
(360) 384-2258

RAAS, JOHNSEN & STUEN, P.S.
HARRY L. JOHNSEN, III
1503 E Street
P.O. Box 5746
Bellingham, WA 98227
(360) 647-0234
Counsel of Record
for Lummi Indian Tribe

January 13, 1998

App. 1

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 53.

JAMES GOUDY, PLAINTIFF IN ERROR,

vs.

**EDWARD MEATH, ASSESSOR OF
PIERCE COUNTY, WASHINGTON.**

**IN ERROR TO THE SUPREME COURT OF THE
STATE OF WASHINGTON.**

FILED JUNE 20, 1905.

(19,808.)

[p. 1] (19,808.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 306.

JAMES GOUDY, PLAINTIFF IN ERROR,

vs.

**EDWARD MEATH, ASSESSOR OF PIERCE COUNTY,
WASHINGTON.**

IN ERROR TO THE SUPREME COURT OF THE
STATE OF WASHINGTON.

INDEX.

	Original.	Print.
Caption	1	1
Transcript from superior court for the county of Pierce	2	1
Complaint	2	1
Answer	9	6
Judgment	11	7
Notice of appeal	12	8
Appeal bond	13	9
Clerk's certificate	14	10
Stipulation to submit	15	10
Agreed statement of facts	16	10
Stipulation to assign	25	19
Opinion	26	19
Substitution of attorneys	32	23
Cost bill	33	23
Judgment	34	24
Assignment of errors	35	24
Petition for writ of error	36	25
Order allowing writ of error	37	26
Writ of error	38	26
Citation and service	41	27
Bond on writ of error	43	28
Clerk's certificate	44	29

512-8.

Filed Apr. 19, 1904. C. S. Reinhart, Clerk.
F. S. Guyot, Dep.

JAMES GOUDY, Plaintiff,

v.

EDWARD MEATH, Assessor of Pierce) # 22774.
County, Washington, Defendant.)

Transcript on Appeal.

In the Superior Court of the State of Washington
for the County of Pierce.

JAMES GOUDY, Plaintiff,)

vs.)

22774.

) Complaint.

EDWARD MEATH, Assessor of Pierce)
County, Washington, Defendant.)

To the honorable judges of the above named court:

The plaintiff named in the above entitled cause complains of the defendant therein named, and for cause of action alleges and respectfully shows to the court as follows.

1.

That on the 26th day of December, 1854, a treaty was concluded and signed between the United States, and the Puyallup and other tribes of Indians, and was thereafter duly ratified and confirmed by the President and Senate of the United States.

App. 4

2.

That by the terms of said treaty, lands were reserved for the members of said bands of Indians, and it was therein agreed that the same were to be assigned and patented to said members in severalty, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, as far as the same may be applicable. That the lands hereinafter described were a portion of the lands so reserved by said treaty.

3.

That the sixth article of said treaty with the Omahas, is in the words following, towit:

"The President may from time to time, at his discretion, cause the whole or such portion of the land hereby reserved, as he may think proper, or of such other land as may be selected in lieu thereof, as provided for in article first, to be surveyed into lots, and to assign to such Indian or Indians, of said tribe as are willing to avail of the privilege, and who will locate on the same as a permanent home, if a single person over twenty-one years of age, one-eighth of a section; to each family of two, one quarter section; to each family of three and not exceeding five, one half section; to each family of six and not exceeding ten, one section; and to each family over ten in number one quarter section for every additional five members. And he may prescribe such rules and regulations as will insure to the family, in case of the death of the head thereof, the possession and enjoyment of such permanent home, and the improvements thereon.

App. 5

And the president may, at any time, in his discretion, and after such person or family has made a location on the land assigned for a permanent home, issue a patent to such person or family for such assigned land, conditioned that the tract shall not be aliened or leased for a longer term than two years; and shall be exempt from levy, sale or forfeiture, which conditions shall continue in force until a State constitution, embracing such lands within its boundaries shall have been formed, and the legislature of the State shall remove the restrictions. And if any such person or family shall at any time neglect or refuse to occupy and till a portion of the lands assigned, and on which they have located, or shall rove from place to place, the president may, if the patent shall have been issued, cancel the assignment, and may also withhold from such person or family, their proportion of the annuities or other moneys due them, until they shall have returned to such permanent home, and resumed the pursuits of industry; and in default of their return, the tract may be declared abandoned, and thereafter assigned to some other person or family of such tribe, or disposed of as provided for the disposition of the excess of said land.

And the residue of the land hereby reserved, or of that which may be, selected in lieu thereof, after all of the Indian persons or families shall have and assigned to them permanent homes, may be sold for their benefit, under such laws, rules or regulations as may hereafter be prescribed by the Congress or President of the United States, No State legislature shall remove the restrictions herein provided for, without the consent of Congress."

App. 6

4.

That plaintiff was born within the territorial limits of the United States; and on and prior to the 17th day of January, 1881, was a member of the Puyallup tribe of Indians, and was one of the members of said tribe entitled to an assignment of land under the provisions of said treaty, and that on said day the land hereinafter described was duly assigned to plaintiff.

5.

That plaintiff availed himself of the privilege thus offered, and accepted said assignment, and located upon said land as a per- [p. 3] manent home, and cleared and cultivated said land, and built a dwelling house and other permanent improvements thereon.

6.

That on the 30th day of January, 1886, under the provisions of said treaty, the United States executed and delivered to plaintiff a patent for said land, which said patent is in the words and figures following, to wit:

"The United States of America to all to whom these presents shall come, Greeting:

Whereas, by the sixth article of the treaty concluded on the twenty sixth day of December, anno Domini one thousand eight hundred and fifty four, between Isaac I. Stevens, governor and superintendent of Indian affairs of Washington Territory, on the part of the United States, and the chiefs, headmen, and delegates of the Nisqually,

App. 7

Puyallup, Steilacoom, Squawskin, S'Homamish, Stehchass, T'Pee-skin, Squiaitl, and Sa-heh-wanh tribe and bands of Indians, it is provided that the president, at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable;

And whereas, there has been deposited in the General Land Office of the United States, an order bearing date January 20th, 1886, from the Secretary of the Interior, accompanied by a return dated October 30th, 1884, from the Office of Indian Affairs, with a list approved October 23rd, 1884, by the president of the United States showing the name of members of the Puyallup band of Indians who have made selections of land in accordance with the provisions of the said treaties, in which lists the following tracts of land have been designated as the selection of James Goudy, the head of a family consisting of himself and Mary, viz: The northwest quarter of the northwest quarter and lots number three, four, seven, and eight, of the section twenty one, in township twenty north of range four east of the Willamette meridian, Washington Territory, containing in the aggregate one hundred nine and 50-100 acres;

Now know ye, that the United States of America, in consideration of the premises and in accordance with the directions of the President of the United States under the

aforesaid sixth article of the treaty of the sixteenth day of March anno Domini one thousand eight hundred and fifty four, with the Omaha Indians, has given and granted and by these presents does give and grant, unto the said James Goudy, as the head of the family as aforesaid, and to his heirs, the tracts of land above described, but with the stipulation contained [p. 4] in the said sixth article of the treaty with the Omaha Indians, that the said tracts shall not be alienated or leased for a longer term than two years, and shall be except from levy, sale or forfeiture, which condition shall continue in force until a State constitution embracing such lands within its boundaries shall have been formed and the legislature of the State shall remove the restrictions, and no State legislature shall remove the restrictions without the consent of Congress.

To have and to hold the said tracts of land, with the appurtenances, unto the said James Goudy, as the head of the family as aforesaid and to his heirs forever, with the stipulation aforesaid.

In testimony whereof, I, Grover Cleveland, President of the United States, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington this thirtieth day of January in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the one hundred and tenth.

By the President: GROVER CLEVELAND.
By M. McKEAN, Secretary.
S. W. CLARK, R."

7.

That since the issuance of said patent, and by an act of Congress passed and approved on the 8th day of February, 1887, plaintiff became and now is a citizen of the United States, and entitled to all the rights, privileges and immunities of such citizens.

8.

That the United States continues to maintain an agent in charge of said reservation, and conducts thereon a school, at which Indian children whose parents reside on such reservation, are maintained free of costs to their parent, are instructed in the elementary branches of learning, and are given practical instruction in farming and other useful pursuits.

9.

That on the 11th day of November 1889, a State constitution embracing said lands within its boundaries was formed.

10.

That the defendant Edward Meath is the duly elected, qualified and acting assessor of Pierce county, Washington, in which said county said lands are situated, and said defendant claims that said lands are subject to taxation for State, county and other municipal purposes, and threatens to, and will, unless restrained by this honorable court, assess said land, and all other land in said reservation, owned and held by Indians, members of said

Puyallup tribe, under [p. 5] patents of the United States similar to plaintiff's for taxes for State, county, and other municipal purposes, and will enter said land upon the tax rolls of said county, and enter and extend taxes against said land for said purpose, and will thereby cast a cloud upon the title to said land, and deprive plaintiff of the quiet enjoyment thereof, and cause him great and irreparable injury.

11.

That plaintiff has no other plain, speedy or adequate remedy at law.

12.

Plaintiff specially sets up and claims immunity from taxation for said land, under and by virtue of said treaty of December 26th 1854, and under and by virtue of the restrictions contained in the sixth article of the treaty with the Omahas.

13.

That at all times since the issuance of said patent, plaintiff has continued to occupy said land as a permanent home, and has cleared said land and cultivated the same and now resides thereon.

Wherefore, plaintiff prays that after due notice to the defendant, and a hearing by this honorable court the defendant be enjoined from placing said land upon the tax rolls of Pierce county, Washington or assessing or attempting to assess said land for State, county, or other

municipal purposes, so long as the same is held and owned by or other municipal purposes, so long as said land is owned by plaintiff or his heirs, or until the legislature of the State of Washington shall remove the restrictions against the taxation of said land, and the Congress of the United States shall consent that such restrictions be removed.

That plaintiff may have such other and further relief as he may be entitled to receive, and that plaintiff recover of and from the defendant his costs and disbursements herein.

GEO. T. REID,
Attorney for Plaintiff.

Office room 405, Chamber of Commerce building,
Tacoma, Pierce county, Wash.

STATE OF WASHINGTON,)
) ss:
County of Pierce,)

James Goudy, being first duly sworn on oath says:
That he is the plaintiff named in the above entitled cause
that he has read the foregoing complaint; knows the
contents thereof, and believes the same to be true.

JAMES GOUDY.

[p. 6] Subscribed and sworn to before me this 14th day of March, 1904.

GEO. T. REID,
Notary Public in and for the State of Washington;

Residing at Tacoma, Pierce County, Washington.

[NOTARIAL SEAL.]

Filed in superior court, March 14, 1904.

A. M. BANKS, Clerk.

In the Superior Court of the State of Washington
in and for Pierce County.

JAMES GOUDY, Plaintiff,)

vs.)

EDWARD MEATH, Assessor of
Pierce County, Washington,
Defendant.)

No. ____

Answer.

Comes now the defendant Edward Meath, as assessor of Pierce county, Washington, and for answer to plaintiff's complaint herein alleges and shows to the court.

First.

Defendant admits the allegations contained in paragraphs one, two, three, four, five, six, seven, nine, ten and thirteen of said complaint.

Second.

Defendant denies each and every allegation contained in paragraph-eight, eleven, and twelve of said complaint.

And for a further and affirmative answer and defense to plaintiff's complaint, defendant alleges:

First.

That all restrictions contained in the treaty and patents aforesaid became extinguished, relinquished and released on the 3rd day of March, 1903, by the act of the legislature of the State of Washington approved March 22nd, 1890, entitled "An act enabling the Indians to sell and alien the lands of the Puyallup Indian reservation in the State of Washington" and an act of Congress approved March 3rd, 1893, known and entitled the Indian approbation [sic] act, and the Government of the United States and the officers thereof ever since the said 3rd day of March, 1903, have abandoned all supervision, and control over the patented lands within [sic] the boundaries of the Puyallup Indian reservation aforesaid, and are not now exercising any authority or control over the same, and have ever since said 3rd day of March, 1903, construed said act of the legislature of the State of Washington of March 22nd, 1890, and of Congress of March 3rd, 1893, as having had the legal effect of removing all restrictions contained in said treaty, stipulation and patents from the said patented lands aforesaid.

[p. 7] Second.

That this defendant, acting under the advice of the prosecuting attorney of Pierce county, Washington, and under and by virtue of the construction placed upon the said acts aforesaid of the legislature of the State of Washington, and of the Congress of the United States, did on the 1st day of March, 1904, assess the said patented lands upon said Puyallup Indian reservation, upon the rolls of Pierce County, Washington, for taxation for the year 1904,

the same as all other lands in the county of Pierce, and intends to and will return the said lands, together with the other property so assessed upon said rolls to the board of equalization of Pierce county, Washington, as by law required.

Wherefore, defendant prays that this action be dismissed, and that he have judgment for his costs and disbursements herein against the plaintiff.

F. CAMPBELL,
Attorney for Defendant.

STATE OF WASHINGTON,)
) ss:
County of Pierce,)

Edward Meath, being first duly sworn, on his oath deposes and says: That he is the duly elected, qualified and acting assessor of Pierce county, Washington, and the defendant in the above entitled action; that he has read the foregoing answer knows the contents thereof, and that the same is true as he verily believes.

EDWARD MEATH.

Subscribed and sworn to before me this 29th day of March, A. D. 1904.

RICHARD W. JAMIESON,
Notary Public in and for the State of Washington,
Residing at Tacoma, Pierce County, Washington.

Filed in open court dept. No. 1, 29 day of March, 1904.

A. M. BANKS, Clerk.
WALKER, Deputy.

In the Superior Court of the State of Washington
for the County of Pierce.

JAMES GOUDY,, Plaintiff,)	
)	
vs.)	No. 22774.
EDWARD MEATH, Assessor of)	Judgment.
Pierce County, Washington,)	
Defendant.)	

This cause coming on to be heard before the court on the 29th day of March, 1904, upon the agreed statement of facts signed by counsel, and filed in this court on the 25th day of March, 1904, no [p. 8] other or different facts than those shown by said agreed statement being offered or considered by the court. Upon said agreed statement counsel for plaintiff and defendant argued the questions of law arising thereon, and the court thereupon reserved said case for consideration.

And now, on this 2nd day of April, 1904, the court being fully advised and being of the opinion that plaintiff's land, and the permanent improvements thereon are subject to taxation, it is,

Ordered, that plaintiff's claim of immunity from taxation for said land and permanent improvements, under and by virtue of the treaty of December 26th, 1854, with the Puyallups, and under and by virtue of the restrictions contained in the sixth article of the treaty with the Omahas is denied.

It is further ordered, that plaintiff's action be and the same is hereby dismissed, and that defendant have and recover of and from the plaintiff, his costs herein.

W. H. SNELL, Judge.

Ent'd J. 96, p. 64; dep. 1.

Apr. 2, 1904.

Filed in superior court, Apr. 2, 1904.

A. M. BANKS, Clerk.

Ex. Doc. No. 21. Page 338.

In the Superior Court of the State of Washington
for the County of Pierce.

JAMES GOUDY, Plaintiff,)

vs.)

EDWARD MEATH, Assessor of
Pierce County, Washington,
Defendant.)

No. 22774.

Notice of
Appeal.

To Edward Meath, assessor of Pierce county, Washington, defendant in the above entitled case, and to F. Campbell, his attorney:

You and each of you are hereby notified that the above named plaintiff, James Goudy, appeals from the final judgment made and entered in said case by the superior court of the State of Washington for the county of Pierce, on the 2d day of April, 1904, to the supreme court of the State of Washington.

Dated this 4th day of April, 1904.

GEO. T. REID,
Attorney for Plaintiff.

I hereby acknowledge due service of the foregoing notice of appeal this 4th day of April, 1904.

F. CAMPBELL,
Attorney for Defendant.

Ent'd J. 96, p. 65; dep. 1.

Apr. 4, 1904.

Filed in superior court, Apr. 4, 1904.

A. M. BANKS, Clerk.

[p. 9] In the Superior Court of the State of Washington
for Pierce County.

JAMES GOUDY, Plaintiff,)

vs.)

EDWARD MEATH, Assessor of
Pierce County, Washington,
Defendant.)

No. 22774.

Appeal Bond.

Know all men by these presents that we James Goudy as principal, and American Bonding Company of Baltimore, a body corporate, duly incorporated under the laws of the State of Maryland, and authorized to transact the business of surety in the State of Washington as surety, are held and firmly bound unto Edward Meath, assessor of Pierce county, Washington, the defendant above named, in the just and full sum of two hundred dollars (\$200.00) for which sum, well and truly to be paid, we bind ourselves, our and each of our heirs, executors and administrators, successors and assigns, jointly and severally firmly by these presents.

Sealed with our seals, and dated this fourth day of April, 1904.

The condition of this obligation is such, that whereas, the above named defendant on the 2nd day of April, A.D. 1904, recovered judgment against the plaintiff above named, dismissing plaintiff's action, and for his costs in the superior court of Pierce county.

And whereas, the above named principal ha- heretofore given due and proper notice that he appeal said decision and judgment of said superior court to the supreme court of the State of Washington.

Now therefore, if the said principal James Goudy shall pay to Edward Meath, assessor, of Pierce county, Washington, the defendant above named, all costs and damages that shall be adjudged against him on the appeal or on the dismissal thereof, not exceeding in amount or value the above named two hundred dollars, then this obligation to be void; otherwise, to remain in full force and effect.

[SEAL.] JAMES GOUDY,
By GEO. T. REID, His Attorney. [SEAL.]
AMERICAN BONDING COMPANY OF BALTIMORE,
By HENRY MOHRN, Vice President.

Attest: L. N. HANSEN,
Assistant Secretary.

Filed the 4th day of March, 1904.

A. M. BANKS, Clerk,
By PETER DAVID, Deputy.

[p. 10] STATE OF WASHINGTON,)
County of Pierce,) ss:

I, A. M. Banks, county clerk and clerk of the superior court of Pierce county, State of Washington, do hereby

certify that the foregoing is a full, true and correct transcript of so much of the record and files in the above entitled cause as I have been directed by the appellant to transmit to the supreme court.

In testimony whereof, I have hereunto set my hand and [SEAL.] the seal of said superior court this 5th day of April, A. D. 1904.

A. M. BANKS, Clerk,
By CHAS. T. PETERSON, Deputy.

Indorsed: Filed in superior court Apr. 6 1904 A. M. Banks, clerk, by Peter David, deputy.

In the Supreme Court of the State of Washington.

JAMES GOUDY, Appellant,)	
vs.)	No. 5128.
EDWARD MEATH, Assessor,)	Stipulation.
Respondent.)	

It is stipulated by the respective parties by their attorneys, George T. Reid and F. Campbell, that the above entitled cause may be submitted without argument upon the briefs filed.

GEORGE T. REID,
Attorney for Appellant.
F. CAMPBELL,
Attorney for Respondent.

Indorsed: Filed May 10. 1904, C. S. Reinhart, clerk, F. S. Guyot. dep.

Filed Apr. 19, 1904. C. S. Reinhart, Clerk. F.S. Guyot, Dep.

In the Superior Court of the State of Washington
for the County of Pierce.

JAMES GOUDY, Plaintiff,)	
vs.)	No. 22774.
)	Agreed
EDWARD MEATH, Assessor of)	Statement of
Pierce County, Washington,)	Facts.
Defendant.)	

It is hereby stipulated and agreed, by and between Geo. T. Reid, attorney for the plaintiff, James Goudy, and Fremont Campbell, prosecuting attorney of Pierce county, Washington, and attorney for the defendant Edward Meath, assessor of Pierce county, Washington, that the following are all the material facts of said case, and that upon this agreed statement of facts, the case shall be tried by the court, with the usual right of appeal to either party.

[p. 11] 1.

That on the 26th day of December, 1854, a treaty was concluded and signed between the United States and the Puyallup and other tribes of Indians, and was thereafter duly ratified and confirmed by the President and Senate of the United States. Said treaty is found in the United States Statutes at large, vol. 10, at page 1132, and is made a part of this agreed statement as fully as if copied herein.

2.

That by the terms of said treaty, lands were reserved for the members of said bands of Indians, and it was therein agreed that the same were to be assigned and patented to said members in severalty, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, as far as the same may be applicable. That the lands hereinafter described were a portion of the lands so reserved by said treaty.

3.

That the sixth article of said treaty with the Omahas is in the words following, towit:

"The President may, from time to time, at his discretion, cause the whole or such portion of the land hereby reserved as he may think proper, or of such other land as may be selected in lieu thereof, as provided for in article first, to be surveyed into lots, and to assign to such Indian or Indians of said tribe as are willing to avail of the privilege, and who will locate on the same as a permanent home, if a single person over twenty-one years of age, one-eighth of a section; to each family of two, one quarter section; to each family of three and not exceeding five, one half section; to each family of six and not exceeding ten, one section; and to each family over ten in number, one quarter section for every additional five members. And he may prescribe such rules and regulations as will insure to the family in case of the death of the head thereof, the possession and enjoyment of such permanent home and the improvements thereon.

And the President may, at any time, in his discretion, after such person or family has made a location on the land assigned for a permanent home, issue a patent to such person or family for such assigned land, conditioned that the tract shall not be aliened or leased for a longer term than two years; and shall be exempt from levy, sale or forfeiture, which conditions shall continue in force, until a State constitution, embracing such lands within its boundaries, shall have been formed; and the legislature of the State shall remove the restrictions. And if any such person or family shall at any time neglect or refuse to occupy and till a portion of the lands assigned and on which they have located or shall rove from place to place, the President may, if the patent shall have been issued, cancel the assignment, and may also with- [p. 12] hold from such person or family, their proportion of the annuities or other moneys due them, until they shall have returned to such permanent home, and resume the pursuits of industry; and in default of their return the tract may be declared abandoned, and thereafter assigned to some other person or family of such tribe, or disposed of as is provided for the disposition of the excess of said land. And the residue of the land hereby reserved, or of that which may be selected in lieu thereof, after all of the Indian persons or families shall have had assigned to them permanent homes, may be sold for their benefit, under such laws, rules or regulations, as may hereafter be prescribed by the Congress or President of the United States. No State legislature shall remove the restrictions herein provided for, without the consent of Congress."

4.

That plaintiff was born within the territorial limits of the United States; and on and prior to the 17th day of January, 1881, was a member of the Puyallup tribe of Indians, and was one of the members of said tribe entitled to an assignment of land under the provisions of said treaty, and that on said day the land hereinafter described was duly assigned to plaintiff.

5.

That plaintiff availed himself of the privilege thus offered, and accepted said assignment, and located upon said land as a permanent home, and cleared and cultivated said land, and built a dwelling house and other permanent improvements thereon.

6.

That on the 30th day of January, 1886, under the provisions of said treaty, the United States executed and delivered to plaintiff a patent for said land, which said patent is in the words and figures following, to wit:

"The United States of America to all to whom these presents shall come, Greeting:

Whereas, by the sixth article of the treaty concluded on the twenty-sixth day of December, anno-Domini one thousand eight hundred and fifty four, between Isaac I. Stevens, governor and superintendent of Indian affairs of Washington Territory, on the part of the United States, and the chiefs, headmen, and delegates of the Nisqually,

Puyallup, Steilacoom, Squawksin, S'Homamish, Stehchass, T'Peeksin, Squiaitl, and Sa-heh-wamish tribes and bands of Indians, it is provided that the President, at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the [p. 13] same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable;

And whereas, there has been deposited in the General Land Office of the United States an order bearing date January 20th, 1886, from the Secretary of the Interior, accompanied by a return dated October 30th, 1884, from the Office of Indian Affairs, with a list approved October 23rd, 1884, by the President of the United States, showing the names of members of the Puyallup band of Indians who have made selections of land in accordance with the provisions of the said treaties, in which lists the following tracts of land have been designated as the selection of James Goudy, the head of a family consisting of himself and Mary, viz. the north west quarter of the north west quarter and lots number- three, four, seven and eight, of section twenty-one, in township twenty, north, of range four east of the Willamette meridian, Washington Territory, containing in the aggregate one hundred nine and 50-100 acres.

Now know ye, that the United States of America, in consideration of the premises and in accordance with the directions of the President of the United States under the

aforesaid sixth article of the treaty of the sixteenth day of March, anno Domini one thousand eight hundred and fifty-four, with the Omaha Indians, has given and granted and by these presents does give and grant, unto the said James Goudy, as the head of the family as aforesaid, and to his heirs, the tracts of land above described, but with the stipulation contained in the said sixth article of the treaty with the Omaha Indians, that the said tracts shall not be alienated or leased for a longer term than two years, and shall be exempt from levy, sale or forfeiture, which conditions shall continue in force until a State constitution embracing such lands within its boundaries shall have been formed and the legislature of the State shall remove the restrictions, and no State legislature shall remove the restrictions without the consent of Congress.

To have and to hold the said tracts of land, with the appurtenances unto the said James Goudy, as the head of the family as aforesaid, and to his heirs forever, with the stipulation aforesaid.

In testimony whereof, I Grover Cleveland, President of the United States, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, this thirtieth day of January, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the one hundred and tenth.

By the President:

GROVER CLEVELAND,
By M. McKEAN, Secretary.

S. W. CLARK, R."

[p. 14] 7.

That since the issuance of said patent, and by an act of Congress passed and approved on the 8th day of February, 1887, plaintiff became and now is a citizen of the United States, and entitled to all the rights, privileges and immunities of such citizens. Said act is found in the United States Statutes at Large, vol. 24, chapter 119, at page 388.

8.

That on the 11th day of November, 1889, a State constitution embracing said lands within its boundaries was formed.

9.

That the legislature of the State of Washington passed an act, approved March 22, 1890, the title of which was as follows: "An act enabling the Indians to sell and alien the lands of the Puyallup Indian reservation, in the State of Washington." That said act is found in the Session Laws of 1889-90 at page 499, and is hereby made a part of this statement of facts, as fully as if copied at length herein.

10.

That the Indian appropriation act, passed by Congress and approved March 3rd, 1893, (27 Stat. at Large page 612) contained the following paragraphs relative to the Puyallup Indians:

"That the President of the United States is hereby authorized immediately after the passage of this act to appoint a commission of three persons, and not more than one of whom shall be a resident of any one State, and it shall be the duty of said commission to select and appraise such portions of the allotted lands as are not required for homes for the Indian allottees; and also that part of the agency tract, exclusive of the burying ground, not needed for school purposes, in the Puyallup reservation, in the State of Washington. And if the Secretary of the Interior shall approve the selections and appraisements made by said commission, the allotted lands so selected shall be sold for the benefit of the allottees, and the agency tract for the benefit of all the Indians, after due notice at public auction at not less than the appraised value for cash, or one-third cash, and the remainder on such time as the Secretary of the Interior may determine, to be secured by vendor's lien on the property sold.

It shall be the duty of said commissioners, or a majority of them to superintend the sale of said lands, ascertain who are the true owners of the allotted lands, have guardians duly appointed for the minor heirs of any deceased allottees, make deeds of the lands to the purchasers thereof, subject to the approval of the Secretary of the Interior, which deeds shall operate as a complete conveyance of the land upon the full payment of the

purchase [p. 15] money; and the whole amount received for the allotted lands shall be placed in the Treasury to the credit of the Indian entitled thereto and the same shall be paid to him in such sums at such times as the Commissioner of Indian Affairs with the approval of the Secretary of the Interior shall direct: Provided, that the portion of the agency tract selected for sale shall be platted into streets and lots as an addition to the city of Tacoma, and sold in separate lots, in the same manner as the allotted lands, and the amount received therefor, less the amount necessary to pay the expenses of said commission, including salaries, shall be placed to the credit of the Puyallup band of Indians as a permanent school fund to be expended for their benefit: And provided further, that the Indian allottees shall not have power of alienation of the allotted lands not selected for sale by said commission for a period of ten years from the date of the passage of this act and no part of the allotted land shall be offered for sale until the Indian or Indians entitled to the same shall have signed a written agreement consenting to the sale thereof, and appointing said commissioners, or a majority of them trustees to sell said land and make a deed to the purchaser thereof; and no part of the agency tract shall be sold until a majority of said Indians shall consent thereto in a written agreement, which shall also constitute said commissioners, or a majority of them, trustees to sell said land as directed in this act, and make deeds to the purchaser for the same. The deeds executed by said commission shall not be valid until approved by the Secretary of the Interior, who is hereby directed to make all necessary regulations to carry out the purposes of the foregoing provisions. The proceeds arising from

the sale of the allotted lands shall be placed in the Treasury to the credit of the respective allottees, and the net proceeds of the agency tract, after paying the expenses of said commission in the appraisement and sale of said lands and reimbursing the United States for the amount advanced to said commission, shall be placed in the Treasury of the United States to the credit of all said Indians, and the said sums shall draw interest at the rate of four per centum per annum, and the income shall be annually expended for the benefit of said Indians, under the direction of the Secretary of the Interior: That an amount not exceeding one tenth of the principal sum may be expended for their benefit during any fiscal year, if deemed necessary by the Secretary of the Interior; provided further, that the entire expense herein incurred shall be apportioned by the Secretary of the Interior pro rata between the several allottees and the owners of the tribal tract; and the Secretary of the Interior may in his discretion designate one member of said commission to superintend the execution of any of the requirements of said commission herein provided for."

11.

That on the 14th day of February, 1903, the honorable Secretary of the Interior, in the regular performance of his official duties, [p. 16] made the following ruling and determination in a letter addressed to the Commissioner of Indian Affairs, which said letter is in the following words:

"DEPARTMENT OF THE INTERIOR,
WASHINGTON, FEBRUARY 14, 1903."

THE COMMISSIONER OF INDIAN AFFAIRS.

SIR: I have considered your letter of the 29th ultimo, requesting instructions in regard to future procedure in the matter of the appraisement and sale of the Puyallup Indian lands in Washington.

The status of these lands is fully discussed in your letter, and shows, in brief, the following conditions: -

By act of the legislature of the State of Washington, approved March 22, 1890, all restrictions regarding alienation and sale of the said lands were removed, the same to take effect upon the consent of the United States to such removal. Under the provisions of the Indian appropriation act approved March 3, 1893, (27 Statutes, 612-633), a commission was appointed whose duty, as specified by the act, was to select and appraise such portions of the allotted lands as were not required for homes for the Indian allottees; and also that part of the agency tract, exclusive of the burying ground, not needed for school purposes, in the Puyallup reservation, and upon the approval of the selection by the Secretary of the Interior, to sell the allotted lands so selected for the benefit of the allottees, and the agency tract lands for the benefit of all the Indians. The said act further provided: - 'That the Indian allottees shall not have power of alienation of the allotted lands not selected for sale by said commission for a period of ten years from the date of the passage of this act, and no part of the allotted land shall be offered for sale until the Indian or Indians entitled to

the same shall have signed a written agreement consenting to the sale thereof * * *'

You invite attention to the fact that the ten years during which the allottees were not to have the power of alienation of their lands will expire on March 3, 1903, and you ask to be advised whether the provision contained in said Indian appropriation act relating to the removal of the restrictions from said lands is such consent as is required by the treaty under which patents were issued to said allottees.

The requirements of the treaties under which the patents were issued to these Indians were: - (1) that the tract should not be aliened or leased for a longer term than two years, and should be exempt from levy, sale or forfeiture; (2) that these conditions should continue in force until a State constitution embracing such lands within its boundaries should be formed, and the legislature of such State should remove said restrictions; and (3) that no State legislature should remove said restrictions without the consent of Congress.

I am of the opinion that the requirements of the treaties with respect to these lands have been fully met, and that the provisions of [p. 17] the act of the legislature of the State of Washington, of March 22, 1890, and the Indian appropriation act of March 3, 1893, referred to above, together operate to remove all restrictions upon the alienation or sale thereof by the allottees. I have therefore to direct that the Puyallup commissioner be instructed to continue the selection and appraisement of such portions of the Puyallup allotted lands *but only with the consent of the Indians*, as provided in the act of March

3, 1893, - until the expiration of the ten year period mentioned, to wit, March 3, 1903, after which date, in my judgment, the Puyallup Indian allottees will 'have power to lease, encumber, grant, and alien the same in like manner and like effect as any other person may be under the laws of the United States, and of' the State of Washington.

You are further directed to instruct the commissioner to take the necessary steps to complete and close up the business of his office as soon as practicable after March 3rd, next.

Very respectfully, E. A. HITCHCOCK, Secretary.

884, Ind. Div. 1903.

M.E.W.

T.R."

12.

That the United States continues to maintain a school upon said reservation, at which Indian children whose parents reside on said reservation, are maintained free of cost to their parents, and are instructed in the elementary branches of learning, and are given practical instructions in farming and other useful pursuits.

13.

That at all times since the issuance of said patent, plaintiff has continued to occupy said land as a permanent home, and has cleared said land and cultivated the same and now resides thereon.

14.

That the defendant, Edward Meath, is the duly elected, qualified and acting assessor of Pierce county, Washington, in which said county said lands are situated; and said defendant claims that said lands and the permanent improvements thereon, are subject to taxation for State, county and other municipal purposes, and threatens to, and will, unless restrained by this honorable court, assess said land, and the permanent improvements thereon, and all other land and permanent improvements in said reservation, owned and held by Indians; members of said Puyallup tribe, under patents from the United States similar to plaintiff's, for taxes for State, county and other municipal purposes, and will enter said land and improvements upon the tax rolls of said county, and enter and extend taxes against said land and improvements for said purposes.

[p. 18] 15.

Plaintiff specially sets up and claims immunity from taxation for said land and the permanent improvements thereon, under and by virtue of said treaty of December 26th, 1854, and under and by virtue of the restrictions contained in the sixth article of the treaty with the Omahas.

16.

That heretofore no taxes have ever been levied or assessed against said land, or the permanent improvements thereon, owned by Indians in said reservation.

GEO. T. REID,
Attorney for Plaintiff.
F. CAMPBELL,
Attorney for Defendant.

STATE OF WASHINGTON,)
) ss.
County of Pierce,)

Indorsed: Statement of facts. Filed in superior court
Apr. 5 194. A.M. Banks, clerk.

Supreme Court of the United States.

OCTOBER TERM, 1905

No. 306.

JAMES GOUDY, PLAINTIFF IN ERROR.

vs.

EDWARD MEATH, ASSESSOR OF PIERCE COUNTY,
WASHINGTON.

STATEMENT.

The plaintiff in error, Goudy, brought suit in the Superior Court of Pierce County, Washington, against Edward Meath, Assessor of Pierce County, Washington, to restrain him from assessing the land of plaintiff in error upon the Puyallup Indian Reservation for the purpose of taxation. (Transcript, pages 1-6.)

The defendant answered the complaint. (Transcript, pages 6-7.)

Counsel for the respective parties thereafter filed an agreed statement of facts. (Transcript, pages 10-18.)

The plaintiff, Goudy, is a Puyallup Indian. Transcript, page 2, paragraph 4.) He specially set up and claimed immunity from taxation for his land under and by virtue of the treaty of December 26, 1854, with the Puyallup Indians, and under the sixth article of the treaty with the Omahas. (Transcript, page 5, paragraph 12.)

[p. 4] Thereafter the Court entered a final judgment denying plaintiff's claim of immunity from taxation and dismissing his complaint. (Transcript, pages 7-8.)

Thereafter Goudy appealed to the Supreme Court of the State of Washington.

On April 4, 1905, the Supreme Court rendered an opinion affirming the decision of the trial Court and holding the land in question to be subject to taxation. (Transcript, pages 19-22.) Final judgment was entered by the Supreme Court on April 20, 1905. (Transcript, page 24.)

April 20, 1905, Goudy filed in the Supreme Court of the State of Washington his assignment of errors and prayer for reversal. (Transcript, page 24); also his petition for a writ of error, (page 25.)

Thereupon the Chief Justice made an order allowing the writ of error; the writ was regularly issued and citation issued, and served. (Transcript, pages 26-28.) A bond as security for costs was duly approved by the Chief Justice and thereupon the record was duly certified to this Court. (Transcript, page 29.)

SPECIFICATION OF ERRORS.

I.

The Supreme Court of the State of Washington committed error in holding and deciding that the Superior Court of the State of Washington, for the County of Pierce, did not commit error in entering judgment dismissing plaintiff's complaint, [p. 5] and especially did said Supreme Court commit error in denying plaintiff in error's claim to immunity from taxation under the treaty of December 26, 1854, between the United States and the

Puyallup tribe of Indians, and under the sixth article of the treaty of March 16, 1854, with the Omahas.

ARGUMENT.

On the 26th day of December, 1854, a treaty was concluded with the Puyallup Indians. (10 Stat., at L. 1132). It provided for the allotment of land in severalty to such of the members of that tribe as might be willing to avail themselves of the privilege and locate on the same as a permanent home. The allotments were to be made on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas.

The sixth article of the Omaha treaty (10 Stat., at L. 1044), after providing for the allotment, gave the president authority to issue patents to the allottees "conditioned that the tract shall not be aliened, or leased, for a longer term than two years; *and shall be exempt from levy, sale or forfeiture.*" It is further provided that the State legislature (when a state should be formed) might remove these restrictions, but not without the consent of Congress.

Under the foregoing treaty and on January 30th, 1886, the patent to the plaintiff, James Goudy, was issued.

The Territory of Washington became a state in 1889. The first legislature that met under the newly formed constitution, enacted the following law:

[p. 6] "AN ACT ENABLING THE INDIANS TO SELL AND ALIEN THE LANDS OF THE PUYALLUP INDIAN RESERVATION, IN THE STATE OF WASHINGTON."

"Whereas, it was and is provided by and in the treaty made with and between the chiefs head men and delegates of the Indian tribes (including the Puyallup tribe) and the United States of America, which treaty is dated on the 26th day of December, 1854, among other things as follows: 'That the president, at his discretion, should cause the whole or any portion of the lands thereby reserved, or such land as might be selected in lieu thereof, to be surveyed into lots and assign the same to such individuals or families as are willing to avail themselves of the privilege and will locate on the same as a permanent home, on the same terms, and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable; and

Whereas, It was and is provided by and in the sixth article of the treaty with the Omahas, aforesaid, among other things, that said tracts of land shall not be aliened or leased for a longer term than two years, and shall be exempt from levy, sale or forfeiture, which conditions shall continue in force until a state constitution embracing such lands within its boundaries shall have been formed, and the legislature of the state shall remove the restrictions, but providing that no state legislature shall remove the restrictions * * * without the consent of the Congress;' and

Whereas, the President of the United States, on the 30th day of January, 1866 (1886), made and issued patents to the Puyallup Indians, in severalty, for the lands of said reservation, which are now of record in the proper office in Pierce County, in the State of Washington; and

Whereas, all the conditions now exist which said treaties contain, and which make it desirable and proper to remove the restrictions in respect to the alienation and disposition of said lands by the Indians, who now hold them in severalty; now, therefore,

Be it Enacted by the Legislature of the State of Washington:

Section 1. That the said Indians who now hold, or who [p. 7] may hereafter hold, any of the lands of any reservation, in severalty, located in this state by virtue of treaties made between them and the United States, shall have power to lease, incumber, grant and alien the same in like manner and with like effect as any other person may do under the laws of the United States and of this state, and all restrictions in reference thereto are hereby removed.

Sec. 2. All deeds, conveyances, encumbrances or transfers of any nature and kind executed by any Indian, or in any manner disposing of any land, or interest therein, shall be by deed executed in the same manner as prescribed for the execution of deeds, conveying real estate, or any interest therein, except that the same shall in all cases be acknowledged before a judge of a Court of record. In taking said acknowledgment, the said judge shall explain to the grantor the contents of said deed or instrument, and the effect of the signing or execution thereof, and so certify the same in the acknowledgment, and before, the same shall be admitted to record shall duly examine and approve the said deed or other instrument.

Sec. 3. This act shall take effect and be in force from and after the consent to such removal of the restrictions

shall have been given by the Congress of the United States. Approved March 22, 1890." Laws 1889-90, page 499.

Under the provisions of the Indian appropriation act, approved March 3, 1893, (27 Stat., at L., 612, Statement, paragraph 10), Congress authorized the appointment of a commission, with power to superintend the sale of these lands for such of the allottees as might care to sell; which act contained the following proviso: "That the Indian allottees shall not have power of alienation of the allotted lands not selected for sale by said commission for a period of ten years from the date of the passage of this act." In the regular performance of his official duties, the Honorable Secretary of the Interior has determined that said act of the legislature and said act of Congress "to- [p. 8] gether operate to remove all restrictions *upon the alienation or sale thereof by the allottees.*" Statement, pages 15 and 16.

For the purpose of this case, it is conceded that the Honorable Secretary's interpretation is correct, and that said allottees have unquestioned right to sell their lands in the usual and ordinary way in which other persons may dispose of their real property.

No attempt has heretofore been made to tax these lands or the permanent improvements thereon. (Statement, page 18, paragraph 16).

It is now claimed, for the first time, that said lands, owned and held by the original Indian allottees or their heirs are subject to state taxation. This question is of the utmost importance to the Indians, and of much importance to the public.

Plaintiff in error maintains that they are not subject to taxation, because the treaty specially exempts them from taxation, and that such restriction has not been removed.

The clause relied upon by plaintiff in error is, of course, the following from the Omaha treaty: "and shall be exempt from levy, sale or forfeiture." That the words just quoted, if still in force, are sufficient to exempt them from state taxation, is judicially settled by the case of *Wan-zop-e-ah vs. County Commissioners*, 5 Wallace, Law Ed., Book 18, page 674, wherein this Court held that these identical words, found in the Miami treaty, were sufficient to preserve the Miami lands from taxation.

Are the restrictions still in force? They are unless they have been removed by the legislature of Washington by and [p. 9] with the consent of the Congress of the United States. Defendant in error relies upon the act heretofore printed, as having worked such removal.

That they are removed by the express terms of the statute cannot be claimed. On the other hand, if it had been the intention of the legislature to remove the restrictions as to voluntary alienation, and at the same time to carefully refrain from the use of any language which might infer an intention to remove the restrictions against involuntary alienation, it is hard to see how better language could have been employed. In the preamble of said act it is recited that all the conditions now exist which make it desirable and proper to remove the restriction *in respect to the alienation and disposition of said lands by the Indians*. Can language be plainer than this? If the legislature had intended to remove, also, the restrictions in

reference to levy, sale or forfeiture, would it not have recited that "all the conditions now exist which make it desirable and proper to remove the restrictions *which said treaties impose*," or words to that effect? Instead of such language, however, we find in every part of this act – title, recitals and the body of the act – language which can only mean that while the legislature was willing that the Indian should sell *if he chose to do so*, it was unwilling to remove the humane restrictions which stood between him and the superior intelligence, rapacity, and cunning of his white brethren. The Indians are given authority to "lease, incumber, grant and alien the same in the manner and with like effect as any other person may do under the laws of the United States and of this state, and all restrictions *in reference thereto* are hereby removed." In view of the title to the act and the [p. 10] recitals of the preamble, and the ordinary rules of language and construction, it will hardly be contended that the words "in reference thereto" refer to all the restrictions contained in the treaty. The Court will, no doubt, give this language its sensible meaning and hold that the words "in reference thereto," mean in reference to the leasing, incumbering, granting and alienation of the land.

Why should it be thought incredible that the legislature should be willing to confer upon these Indians the right to voluntarily lease, encumber, or alien their lands, under the safeguards imposed by the act, and unwilling to subject them to taxes, which they cannot pay. The legislature has, in this act, with commendable justice and foresight, provided that any transfer "*of any nature and kind*," executed by any Indian, in any manner disposing of any land, or any interest therein, shall in all cases be

acknowledged before a judge of a Court of record; and the judge is required to explain to the grantor the contents of the instrument and the effect of the execution thereof, and to examine and approve the same. It is hardly reasonable to say that it could have been the intention of a legislature that was unwilling that one of these Indians should be allowed to place the slightest encumbrance upon his land, unless he appeared before a judge of a Court of record and had the matter fully explained to him, and the judge should examine and approve the instrument, to remove completely and absolutely, and that by mere implication, the other restrictions contained in the treaty, which certainly were of equal or greater importance.

This case was argued before the State Courts and will be argued in this Court upon the theory that the question involved [p. 11] is merely one of construction, viz.: do the act of the legislature and the act of Congress, taken together, remove the restrictions against levy, sale or forfeiture.

The Supreme Court of Washington in its opinion correctly states the point involved in the case at bar in the following words: "So that the real question in the case is, Have the restrictions that the land 'shall be exempt from levy, sale or forfeiture' been removed?" (Transcript, page 21).

The Court then decides that the following words found in the act of Congress of March 3, 1893 (27 Stats. at Large, p. 633): "And provided further that the Indian allottees shall not have the power of alienation of the allotted lands not selected for sale by said commissioners

for the period of ten years from date of the passage of this act," were by necessary implication a removal of all restrictions upon alienation whether voluntary or involuntary after the expiration of the ten year period. In other words the Court holds that the limitation against levy, sale and forfeiture is a mere incident and necessarily cease [sic] to operate when the restriction upon the voluntary sale by the Indian has been removed.

We are wholly unable to follow the Court's reasoning in this matter. Why does it follow that because the Indian is allowed to sell his land if he so elects, that therefore no good purpose can be subserved by not subjecting it to taxation? The case at bar is strong proof to the contrary. The complaint shows that Goudy has never sold a single foot of his land; he alleges that he still owns and lives upon the land in the patent described. Does it follow that because Goudy is too prudent to dispose of [p. 12] his land that therefore he should be taxed and subjected to the dangers of executions? If it were the policy of the law to force or encourage the Indian to sell, perhaps no better plan could be adopted than to tax it to the limit, for no person, acquainted with these Indians, will for a moment believe that they will or can pay taxes. Perhaps a few of the more thrifty ones may do so, but to the majority their total yearly earnings would not pay the taxes of a single year. As a matter of fact, the policy of the government for the last fifty years has steadily been to encourage, by every possible means, the adoption of habits of settled industry by the Indian, and their settlement upon and cultivation of the soil.

But whatever the Court may think of the act of the legislature, it is true that the act was only effectual in so

far as it received the assent of Congress. The assent of Congress went no further than to confer upon the Indian the power to sell his land. (Transcript, page 15). It certainly cannot be claimed that the assent went to the removal of the restrictions against levy, sale or forfeiture.

So we arrive at this point in the argument: that unless the mere fact of the removal of the restrictions against alienation, *ipso facto* removed the restrictions against taxation, then such restrictions have not been removed.

Congress has certainly never considered that there was any inconsistency in granting the Indian an absolute fee simple title, with full power of alienation, and still preserving the land from state taxation. The treaty of January 31, 1855, with the Wyandotts (10 Stat. at L., page 1159) is a good illustration. This [p. 13] treaty provided for the grant of lands in severalty to the Wyandotts. It further provided that the commissioners appointed under the act should make lists of the members of the tribe, showing first, those families, the heads of which are sufficiently intelligent, competent and prudent to control and manage their affairs and interests. Second, those which are not so competent, and third, the orphans, idiots or insane. Article four provides that upon receipt of these lists by the Commissioner of Indian Affairs, patents shall be issued. To those of the first class (the competents) the patents shall contain an absolute and unconditional grant in fee simple, but to those not competent, the patents shall contain restrictions against alienation. The article then provides that: "None of the lands to be assigned and patented to the Wyandotts, shall be subject to taxation for a period of five years from and after the organization of a

state government over the territory where they reside. * * * "

Here we have a distinct assertion by the treaty-making power, of the right of the government to grant, by patent, to an Indian, a tract of land, with full power of alienation, and yet with a distinct restraint against taxation.

In the case of Wan-pe-man-qua vs. Aldrich, 28 Fed., at page 496, Judge Woods says: "There seems to me to be no reason, speaking generally, why the unrestricted right to alienate should make Indian lands taxable, which otherwise would not be."

The presumption is not violent that both the legislature and Congress were informed of the conditions existing on the Puyallup reservation. It may well be presumed that both branches of the government knew that but a small fraction of [p. 14] this land was being actually cultivated by the Indians; that the major portion of it was covered by dense forests which the Indian could not or would not clear; that a considerable portion of it is salt-marsh, wholly unsuited to cultivation or use by the Indian; and that to permit the Indian to dispose of such of his land as was of no use to him, would be a benefit to him, and also to the white population. It can hardly be presumed that Congress would have been willing to subject the "home place" of the Indian to state taxation, in view of the fact that it has been the constant aim of Congress to encourage, by every means possible, the cultivation of the soil by the Indians.

No great amount of light is thrown upon the case at bar by the consideration of the adjudged cases. The circumstances surrounding each case which counsel for plaintiff in error has been able to find, are in at least some particulars so different from the facts in this case, as to render the case of but little value as an authority. The case of *Blue Jacket vs. Commissioners*, 5 Wallace, Law Ed., Book 18, page 667, is perhaps the leading case on the subject. In that case the facts were quite similar in some respects, viz., the land had been allotted in severalty; the Indians lived among the whites; and their tribal customs (as actually observed) had been much broken into. But the decision was placed upon the ground that the tribal relation actually existed, which renders it of no value as an authority in this case.

In *United States vs. Rickert*, 188 U. S. Law Ed., Book 47, page 532, the tribal relation no longer existed; the Indians had been made citizens by the very same act which made the Puyallups citizens, although the fact is not clearly stated by the Court. But in that case the decision is largely based upon the [p. 15] fact that the *title* was held in trust by the United States, and that therefore, the permanent improvements upon the land were not taxable. The Court does, however, at page 538 of the volume above cited, make use of language which illustrates the liberal view which the Court takes of questions of this kind, showing that the strict and narrow logic appropriate enough when construing acts of a certain nature, is entirely out of place when dealing with the rights of this unfortunate race, so utterly helpless to protect their own rights, and so completely dependent upon the superior justice of our courts. The Court says:

"Counsel for the appellee suggests that the only interest of the United States is to be able at the end of twenty-five years from the date of allotment to convey the *land* free from any charge or encumbrance; that if a house upon Indian land were seized and sold for taxes, that would not prevent the United States from conveying the *land* free from any charge or encumbrance; and that, in such case, the Indians could not claim any breach of contract on the part of the United States. These suggestions entirely ignore the relation existing between the United States and the Indians. It is not a relation simply of contract, each party to which is capable of guarding his own interests, but the Indians are in a state of dependency and pupilage, entitled to the care and protection of the government. When they shall be let out of that state is for the United States to determine without interference by the Courts or by any state. The government would not adequately discharge its duty to these people if it placed its engagements with them upon the basis merely of contract, and failed to exercise any power it possessed to protect them in the possession of any improvements and personal property as were necessary to the enjoyment of the land held [p. 16] in trust for them." This case is particularly valuable because it recognizes the right of the United States to act as guardian and protector of the Indian after, as well as before, the dissolution of the tribal relation. Is it within the spirit of the above case to try, by extending the act of the state legislature far beyond its plain reading, to make these lands subject to state taxation before Congress has in any manner consented thereto?

In reason, why are these lands any more liable to taxation than they have been for the past ten years? The only difference to be noted is, that since March 3, 1903, the Indians have been able to sell their lands directly to the purchaser, whereas, before that date they could only make sales through the Commissioner appointed for that purpose. But that formality was but a mere regulation to insure the Indian a fair consideration and an actual payment of the consideration. The *Title* was just as much in the Indian before as after that date. It is possible that the state Court was impressed with the idea that the Indian should pay taxes. That question is, however, one that no court has a right to consider. We quote from the closing paragraph of *United States vs. Rickert*, 188 U. S., 47 Law Ed., page 539: "Some observations may be made that are applicable to the whole case. It is said that the state had conferred upon these Indians the right of suffrage and other rights that ordinarily belong only to citizens, and that they ought, therefore, to share the burdens of government like other people who enjoy such rights. These are considerations to be addressed to Congress. It is for the legislative branch of the government to say when these Indians shall cease to be dependent and assume the responsibilities attaching to citizenship. This is a political [p. 17] question, which the Courts may not determine. We can only deal with the case as it exists under the legislation of Congress."

It will be conceded, we presume, that if plaintiff in error is entitled to exemption as to his land that the same exemption will apply to the permanent improvements upon the land, under the decision of *United States vs. Rickert*, 188 U. S., heretofore cited.

It is respectfully submitted that the judgment of the state court should be reversed, with directions to enter judgment for plaintiff in error according to the prayer of his complaint.

WALTER CHRISTIAN,

Attorney for Plaintiff in Error.

Tacoma, Wash.

ILLEGIBLE

IN THE
SUPREME COURT of the UNITED STATES

JAMES GOUDY,

Plaintiff in Error,

vs.

EDWARD MEATH, Assessor of Pierce

County, Washington,

Defendant in Error.

No. 53.

Error to the Supreme Court of the
State of Washington

BRIEF OF DEFENDANT IN ERROR

CHARLES O. BATES AND
WALTER M. HARVEY,

Attorneys for Defendant in Error

TACOMA, WASHINGTON.

[This page is not numbered, next page is page 4]

IN THE
SUPREME COURT of the UNITED STATES

JAMES GOUDY,

Plaintiff in Error,

vs.

EDWARD MEATH, Assessor of Pierce

County, Washington,

Defendant in Error.

ARGUMENT

In 1854 the United States government entered into a treaty with the Omaha tribe of Indians by the terms of which it was provided in the 6th Article thereof that there should be selected and allotted to such Indians as desired, certain lands selected by them, which lands should be held in severalty subject to such regulations as the President might prescribe, as will insure to the Indian and his family, in case of his death, the possession and enjoyment of such premises. It further provided that the President could issue patents therefor, conditioned that the lands should not be alienated or leased for a longer period than two years and should be exempt from levy, sale or forfeiture, which conditions should continue in force until a state constitution embracing such lands

within its boundaries should be formed and the legislature of the state should remove the restrictions.

10 U. S. Statutes, 1132.

[p. 4] On the 26th of December, 1854, a treaty was entered into with the Puyallup tribe of Indians by the terms of which the lands belonging to such tribe should be surveyed into lots and they should be assigned and allotted to the individual Indian:

"On the same terms and subject to the same restrictions as are provided in the 6th Article of the treaty with the Omahas, as far as the same may be practicable."

10 U. S. Statutes, Sec. 6, Page 1133.

In pursuance to this treaty and act of Congress the lands belonging to the Puyallup Indians were all allotted to the individual members of the tribe, and each took possession of their respective tracts and the plaintiff in error acquired the land described in the complaint in this manner and in 1886 a patent was issued to him therefor, containing the following conditions: "That the said tract should not be alienated or leased for a longer term than two years and should be exempt from levy, sale or forfeiture, which conditions shall continue in force until a state constitution embracing such lands within its boundaries shall have been formed and the legislature of the state shall remove the restrictions, and no state legislature shall remove the restrictions without the consent of Congress."

The Congress of the United States passed an act on February 8th, 1887 (23 U. S. Stat., 390) wherein it was provided among other things, as follows:

Sec. 6. "That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribe of Indians to whom allotments shall have been made, shall have the benefit of and be subject to, the laws, both civil or criminal, of the state or territory in which they may reside, and no territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law; and every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States and is entitled to all the rights, privileges and immunities of such citizen."

By the terms of this statute when these lands were allotted to the individual Puyallup Indians, their tribal relations ceased and they became, and were, citizens of the United States and entitled to all the rights, privileges and immunities of such citizens and became subject to all the laws, both civil and criminal, of the State of Washington; since which time they have exercised the right of elective franchise, have held office and have been accorded and have exercised all the rights of other citizens, except as to the control of their land.

In 1889 Washington adopted a state constitution which embraced the land belonging to the Indians, and the land of Plaintiff in Error, described in the complaint. After the adoption of this constitution the legislature of

the State of Washington on the 22nd day of March, 1890, enacted a law entitled:

"Puyallup Indians may sell lands. An act enabling Indians to sell and alien the lands on the Puyallup Indian Reservation in the State of Washington," wherein it provided as follows: "Whereas, all the conditions now exist which said treaties contain and which make it desirable and proper to remove the restrictions in respect to the alienation and disposi- [p. 6] tion of said lands by the Indians who now hold them in severalty; Therefore be it enacted by the legislature of the State of Washington, Sec. 1. That the said Indians shall have the power to lease, incumber, grant and alien the said lands in like manner and with like effect as any other person may do under the laws of the United States and of this State, and *all restrictions in reference thereto are hereby removed.*"

This act further provided that it should be in force from and after the consent to the removal of such restrictions by the Congress of the United States. Thereafter, on March 3rd, 1893, Congress passed an act (27 U. S. Stat., 633) providing for the appointment of three commissioners who should, under their terms and restrictions therein contained, proceed to sell the lands of the Puyallup Indians, who should give their consent thereto. By the terms of this act it was provided:

"That the Indian allottees should not have the power of alienation of the allotted lands not selected for sale by the said commissioners, for the period of ten years from the date of the passage of this act."

It is the contention of the defendant in error that the aforesaid act of the legislature of the State of Washington,

together with this act of Congress, removed all restrictions after the expiration of the ten year period referred to in the last mentioned act.

That the restrictions against alienation theretofore existing were removed, seems too clear for argument: The proviso referred to could have no other meaning, for at the time of the passage of said act, under the 6th Article of the treaty with the Omahas, the Indian could not alienate his tract of land for a longer period than two years. Manifestly then, when Congress [p. 7] enacted that the allotted lands not selected for sale by the Indian Commissioner should not be alienated for a period of ten years, or until March 3rd, 1903, it by plain and necessary implication intended to, and did, provide that thereafter such lands so allotted could be sold and transferred and that there should no longer remain any restrictions whatsoever against voluntary alienation.

The Honorable Secretary of the Interior has so construed this act (See record, pages 16-17) and the plaintiff in error concedes, this position to be well taken. We contend that it was certainly the intention of Congress in this act that when the "Power of alienation" of the Indian allottees is referred to, that clause pertained to the involuntary as well as the voluntary alienation. The provision of the aforesaid Art. 6 of the treaty with the Omahas: "That the lands shall be exempt from levy, sale or forfeiture," was to prevent that from being done indirectly which could not be done directly; these restrictions, first, as to the direct sale by voluntary act of the Indian, and secondly, by his involuntary act in allowing conditions to arise which would permit the forced sale of his land are so inseparably connected that we do not think a fair and

reasonable construction of the act will permit the one to be removed and the other to remain. All the restrictions were against alienation in one form or another, and those against levy, sale or forfeiture, were simply to effectively preserve to the Indian his allotted land from sale by operation of law as long as he could not dispose of it by his voluntary act. The limitation against levy, sale and forfeiture is a mere incident and must necessarily cease to operate when the restrictions upon the voluntary sale [p. 8] by the Indian have been removed. Since March 3rd, 1903, he has the power of voluntary alienation, consequently the very object and purpose of the restrictions as to levy, sale and forfeiture no longer exist.

But it is only necessary for this court to hold that the language of the act of Congress amounted to a consent to the removal. By the terms of the treaty the removal of the restrictions was to be made by the state legislature; that body, by the act above quoted, provided that all the restrictions were removed, and we earnestly insist that with this law on the statute books of the State of Washington, the Congress of the United States intended to, and did give its consent that all restrictions should be removed, when they passed this act of March 3rd, 1903.

In so far as the act of the legislature of the State of Washington is concerned, the removal of the restrictions as to levy, sale and forfeiture is not made by implication; it seems to us that no language could be plainer or stronger, that *all restrictions* therefore existing were removed. It is ingeniously argued that the words: "In reference thereto" refer to the restrictions merely against leasing, etc., but we think this language refers plainly to the restrictions upon the land – in reference to the land,

and that all restrictions were therefore in direct and unambiguous language, removed and those against levy, sale or forfeiture are not removed simply by implication, but by direct and positive statutory enactment. The language taken in its usual and ordinary sense and giving it a fair and reasonable interpretation is, that all restrictions in reference to the land are hereby removed.

[p. 9] Moreover, the legislature of the State of Washington on the 30th day of March, 1899, passed an act entitled: "An act relating to the sale of allotted lands by the Indians," wherein it provided that it was the intention of the act: "To remove from the Indians residing in this State all the existing disabilities relating to the alienation of their real estate."

Both Congress and the State Legislature have therefore removed all restrictions in reference to the alienation of these lands by the Indians and they can be sold and conveyed as fully as lands owned by other citizens of the State; this is conceded on the part of counsel for plaintiff in error, but he insists that while the Indian may convey his land, it cannot be sold by levy, sale or forfeiture, and therefore not being subject to levy, cannot be assessed for taxes.

We cannot agree with this position. In construing the acts of the legislature the purpose and object to be maintained must always be kept in mind and the law be so construed as to give force and effect to that intent. The intention of Congress originally was to protect the Indian in the possession of his land and he was deprived of the power of voluntarily disposing of the same and to further the purpose of the act it was provided that it should not

be subject to levy, sale or forfeiture, for if it could be involuntarily taken from him through levy, sale or forfeiture the very purpose of the law would be defeated.

When these restrictions against alienation have been removed and the Indian has been given authority to sell his land, there can be no purpose or good subserved by not making it sub- [p. 10] ject to levy, sale or forfeiture, for with these provisions in the land is not preserved to the Indian as long as he has a voluntary right of disposition of the land, and when, therefore, the restrictions against alienation were removed by Congress by the lapse of ten years time, and by the legislature of the State of Washington, they intended to remove all disabilities relating to alienation, whether voluntary or involuntary, either by the Indian himself, or by levy, sale and forfeiture of his land. The levy, sale and forfeiture clause was incorporated in the patent to protect him in the possession of his land, and since the Indian is no longer under the protection of the law as to the sale of his property, it would be vain to say that the legislature intended that the land should not be subject to levy, sale or forfeiture. These Indians possess all the rights of citizenship; many of their lands have passed into the hands of other citizens; why should not this land now be held to share its just burden of public taxation? We cannot think that the legislature of the State of Washington ever intended after they granted the Indians the right to dispose of his land, to still relieve the land from sharing its just burden of taxation, or to say that they intended that it should not be liable to levy and sale for the satisfaction of his legal debts and obligations. The language of the act of the

legislature must be construed with reference to its evident intent, and not too strictly with reference to its phraseology; very often the acts of the legislature are prepared by men who are not lawyers and the best language it [sic] not always used to express the object and the purpose of the act, but it seems to us clear that although the legislature, and Congress itself, did not when they raised the restrictions that were existing against [p. 11] this land use the identical language and phraseology contained in the treaties and the patent, that the evident intent and purpose was to remove the restrictions, and all of them, of every kind or nature that were against either the voluntary or involuntary alienation of this land. The act of the legislature of the State of Washington, it is true, does not follow the exact language of the patents, but in order to understand what was intended by the act it is necessary to read the whole of it.

The Indians are given authority by the act to lease, incumber, grant and alien the same in like manner and with like effect, as any other person may do under the laws of the United States and this State and all restrictions in reference thereto are hereby removed. The words: "And all restrictions in reference thereto are hereby removed" used in the act certainly must relate to the lands and not to the words "Lease, incumber, grant and alien."

The point is made by learned counsel for plaintiff in error that the language used could only mean that, while the legislature was willing that the Indian could sell, if he chose to do so, it was unwilling to remove the humane restrictions which stood between him and the superior intelligence, rapacity and cunning of his white brother,

but we are unable to understand the logic of this kind of an argument. If the State and Nation are willing to remove the restrictions against the Indian selling his land, certainly they would not be unwilling to remove the restrictions upon taxation upon the ground of the superior intelligence, rapacity or cunning of the taxing officers of the State. It would rather appear to us that the law-making bodies [p. 12] of such State and Nation would consider the restrictions upon the voluntary sale of the land the more proper safeguard against the superior intelligence, rapacity and cunning of his white brother.

When the United States stipulated with the Indian that he could not sell his lands until the happening of certain events, both in the treaty and in his patent, specified; it was because the government did not think the Indian capable of dealing with his own in an untutored state, and it was to preserve the land to him until he adopted the habits of the whites and civilized life, and should be able to understand the value thereof; and in order to fully accomplish this end it was also stipulated that these lands should not be subject to levy, sale or forfeiture. The restrictions upon alienation would be of no avail to the Indian if his land could be levied upon or forfeited, and it was necessary to provide against this as well as alienation. These restrictions were to remain upon the lands until in the wisdom of the legislature of the State in which the land was located, they should be removed. The Congress of the United States did not reserve either in the treaty or in the patent, the right to say how or in what manner these restrictions should be removed by the legislature; the treaty and the patent only reserved to Congress the single right to either give or

withhold consent to the removal of these restrictions, and that part of the act aforesaid of March 3rd, 1893, which gave its consent to the sale of these lands by the Indians after ten years was an expression by Congress of a willingness on its part that the lands might be alienated by the Indians after that time, and as to whether the restrictions as to levy, sale and forfeiture have been re- [p. 13] moved must be determined by the act of the legislature in connection with the consent of Congress.

The Wyandottes case, cited by plaintiff in error, and other cases referred to are not in point here because those patents contained an express exemption from taxation for a period of five years. Neither is the case of the Kansas Indians in point, because those lands belonged to tribal Indians; Indians who have never severed their tribal relations; nor is the case of the United States vs. Rickert in point, because in that case the United States expressly, by the terms of the patent, held the lands in trust for a period of twenty-five years, at the end of which period it was to convey the lands absolutely to the Indian, and under such circumstances no one would contend that the land would be subject to taxation during that period. But the conditions here are entirely different; not only are the Puyallup Indians citizens of the United States and endowed with all the rights, privileges and immunities of all citizens of the State, and subject to all the laws, both civil and criminal of the State, but they exercise those rights fully; they vote, hold office; have long ago severed their tribal relations; have adopted the habits of civilized life; their lands have been patented to them in severalty; there is no trust relationship existing between the government and these Indians relating to their lands; they have

long ago ceased to be wards of the government, the government has entirely relinquished and abandoned all control over them and their lands. The State Legislature has removed all restrictions therefrom and there is no sound reason that can be advanced why these lands are not taxable now the same as any other lands.

[p. 14] We agree with counsel for plaintiff in error, that very little light can be thrown on this case from former adjudications; this case stands alone and must be decided upon its own merits from a construction of the acts of the State Legislature and congressional enactments. Counsel for plaintiff in error contends that the moment the Indian patentee sells his land then of course it becomes taxable. He says the exemption is not to the soil, but to the Indians' land. That, it seems to us, is a very violent assumption; the treaty and the patent both expressly provide that the land shall not be sold or alienated for a longer period than two years and shall be exempt from levy, sale or forfeiture until a state constitution is formed embracing such land within its boundary, and the State Legislature shall remove such restrictions. These restrictions are upon the land and relate directly to the land itself. The treaty and the patents do not say that such restrictions shall be upon the land only while the title is in the hands of the Indian, but they shall remain upon the land until removed therefrom by the legislature, with consent of Congress. The reasoning of the case seems to be that because of the restrictions upon these lands they must be exempt until such restrictions are removed in the manner provided by the treaty and patents. The mere transfer of title in itself certainly cannot operate to remove such restrictions, and it is because of

the peculiar situation in which the lands would be left were the contentions of plaintiff in error to prevail, that the courts will give to the acts of the legislature a construction which is consistent with sound reason under the circumstances of the case. The legislature certainly did not intend to remove merely the restrictions upon alienation of these lands so that the Indian could sell them to [p. 15] any white, black or red person and still allow such lands to escape their just proportion of the burdens of taxation. If such was the intention of the legislature then that body violated the constitutional prohibitions against such legislation, because these lands once the restrictions against alienation are removed, lose their character as lands which under the constitution of the state and laws of the United States are exempt from taxation. Then why, we ask, is it reasonable to say that the legislature only intended to remove the restrictions upon alienation and intended to, and did retain the restrictions against taxation until some further time in the future? To say to the Indian, you may sell your land today, the restrictions are all removed, but we will not, and do not intend, to remove the restrictions against taxation of these lands, no matter whether you sell them or not, seems too great an absurdity to require serious consideration. It seems to us that it would be more reasonable to say that if the legislature intended to grant to the Indian the right to sell his land, and that if that was the only restriction intended to be removed by the act of the legislature of 1890, the same act would have provided that all other restrictions upon such land contained in the patent should remain upon the land while the title to such land remained in the Indian, and if it had been the intention of the legislature to only

remove the restrictions as to alienation it would have undoubtedly provided that the other restrictions should remain upon such land until the Indian had parted with his title.

In conclusion we desire to say to the Court, that it must be apparent from a reading of the whole act that the clear intention of the legislature must have been to remove all restrictions contained in the patents to these lands. Should the Court hold otherwise it would require a further act of the legislature, and the further consent of Congress before these lands could be taxed, no matter who becomes the owner thereof, and the effect of such holding would be that eighteen thousand acres of the most valuable lands in the State of Washington would escape their just proportion of the burden of taxation, without any just reason therefor, and in violation of the rights of other taxpayers in the State of Washington.

We respectfully submit to the Court that the judgment of the Supreme Court of the State of Washington should be affirmed.

Respectfully submitted,

CHARLES O. BATES AND
WALTER M. HARVEY,
Attorneys for Defendant in Error.

TACOMA, WASHINGTON.

174
No. 97-104

16
Supreme Court U.S.
FILED

JAN 20 1998

CLERK OF THE COURT

In The
Supreme Court of the United States
October Term, 1997

CASS COUNTY, MINNESOTA, et al.,

Petitioners,

vs.

LEECH LAKE BAND OF CHIPPEWA INDIANS,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Eighth Circuit

JOINT BRIEF OF THE GRAND PORTAGE BAND OF
CHIPPEWA; THE RED LAKE BAND OF CHIPPEWA;
AND SISSETON-WAHPETON SIOUX TRIBE AS
AMICI CURIAE IN SUPPORT OF RESPONDENT

VANYA S. HOGEN-KIND,
Counsel of Record
SUSAN L. ALLEN
BLUEDOG, OLSON & SMALL, P.L.L.P.
Southgate Office Plaza, Suite 500
5001 West 80th Street
Minneapolis, Minnesota 55437
Telephone (612) 893-1813
Attorneys for Amici Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-0964
OR CALL COLLECT (402) 343-3881

BEST AVAILABLE COPY

12/20/97

QUESTION PRESENTED

Given that the Nelson Act is silent on the issue of tribal tax immunity, does it evidence the requisite "unmistakably clear" congressional intent to grant tax jurisdiction to county governments?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
INTEREST OF THE <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT.....	1
ARGUMENT	4
I. IN RECOGNITION OF THE PLENARY AUTHORITY OF THE FEDERAL GOVERN- MENT OVER TRIBES AND TRIBAL SOVER- EIGNTY, TRIBES ARE IMMUNE FROM STATE TAXATION OF RESERVATION LANDS.....	4
A. The Tax-exempt Status of Reservation Lands Arises Out Of The Unique Political Status of Tribes.....	5
B. Tribes Are Separated From The Tax Juris- diction Of The State Because The Constitu- tion Vests The Federal Government With Exclusive Authority Over Relations With Indian Tribes.....	10
II. THE NELSON ACT DID NOT DIMINISH THE LEECH LAKE RESERVATION OR ALTER THE TAX-EXEMPT STATUS OF RESERVATION LANDS OVER WHICH THE FEDERAL GOV- ERNMENT AND THE TRIBE HAVE ALWAYS RETAINED JURISDICTION	13
CONCLUSION	17

TABLE OF AUTHORITIES

	Page
FEDERAL CASES	
<i>Choctaw, Oklahoma & Gulf R. Co. v. Mackey</i> , 256 U.S. 531 (1921)	8
<i>County of Yakima v. Yakima Nation</i> , 502 U.S. 251 (1992)	2, 4
<i>DeCoteau v. Tenth Judicial District</i> , 420 U.S. 425 (1975)	13, 15, 16
<i>Goudy v. Meath</i> , 203 U.S. 146 (1906)	9
<i>Hagen v. Utah</i> , 510 U.S. 399 (1994)	15
<i>Leech Lake Band v. Cass County</i> , 108 F.3d 820 (8th Cir. 1997)	9, 11, 14, 15
<i>Leech Lake Band v. Herbst</i> , 334 F. Supp. 1001 (D. Minn. 1971)	14, 15, 16
<i>Mattz v. Arnett</i> , 412 U.S. 481 (1973)	16
<i>McClanahan v. Arizona State Tax Comm'n</i> , 411 U.S. 164 (1973)	5, 6, 11
<i>Menominee Tribe v. United States</i> , 391 U.S. 404 (1968)	11, 12
<i>Mescalero Apache Tribe v. Jones</i> , 411 U.S. 145 (1973)	4, 6, 8, 11
<i>Montana v. Blackfeet Tribe of Indians</i> , 471 U.S. 759 (1985)	5, 11
<i>Oklahoma Tax Comm'n v. United States</i> , 319 U.S. 598 (1943)	9
<i>Oneida Indian Nation v. County of Oneida</i> , 414 U.S. 661 (1974)	14
<i>Seymour v. Superintendent</i> , 368 U.S. 351 (1962)... ..	13, 15, 16

TABLE OF AUTHORITIES - Continued

	Page
<i>The Kansas Indians</i> , 72 U.S. (5 Wall.) 737 (1866) ..	5, 6, 7, 8
<i>The New York Indians</i> , 72 U.S. (5 Wall.) 761 (1866)..	5, 6, 7
<i>Thomas v. Gay</i> , 169 U.S. 264 (1889)	10
<i>United States v. Celestine</i> , 215 U.S. 278 (1909)	13
<i>United States v. Rickert</i> , 188 U.S. 432 (1902).....	8, 10
<i>Washington v. Confederated Tribes of Colville Indian Reservation</i> , 447 U.S. 134 (1980)	11
<i>Williams v. Lee</i> , 358 U.S. 217 (1959).....	4
<i>Worcester v. Georgia</i> , 31 U.S. (6 Pet.) 515 (1832)	5, 6
STATE CASES	
<i>State v. Forge</i> , 262 N.W.2d 341 (Minn. 1977)	14
STATUTES, CODES AND RULES	
18 U.S.C. 1151(a)	13
Menominee Termination Act of 1954, 25 U.S.C. § 899 (1954).....	11
Nelson Act of January 14, 1889, ch. 24, 25 Stat. 642 (1989)	9, 14, 15, 16, 17
MISCELLANEOUS	
Felix S. Cohen, <i>Handbook of Federal Indian Law</i> , 514 (1982 ed.)	13, 14

INTEREST OF THE AMICI CURIAE

Amici are three federally-recognized Indian tribes. Two of the tribes, the Grand Portage Band of Chippewa and the Red Lake Band of Chippewa, are located in northern Minnesota. The third, the Sisseton-Wahpeton Sioux Tribe, is located in northeastern South Dakota and southeastern North Dakota.

All three tribes lost substantial landholdings by operation of the General Allotment Act and similar federal laws. Many parcels on Grand Portage Reservation were sold or forfeited to non-Indians under the Nelson Act - the same statute under which the Leech Lake Band lost the lands at issue in this matter.

Fortunately, the tribes have been able to re-purchase a portion of their lost homelands, and they currently hold some of those lands in fee. The tribes have been subjected to state property taxes on their re-purchased fee lands by the surrounding counties, and have thus suffered the same imposition on their tribal tax immunity as has the Leech Lake Band with respect to Cass County.

SUMMARY OF ARGUMENT

Cass County cannot identify any unmistakably clear statutory language granting it jurisdiction to impose its *ad valorem* property taxes on lands owned in fee by the Leech Lake Band within the boundaries of its reservation, which were originally sold as pine and homestead lands

under the Nelson Act.¹ The unmistakable intent rule, which is rooted in the canons of construction applicable in Indian law, recognizes the exclusive authority of the federal government over Indian affairs. In light of the rule, the removal of restrictions on alienation under the Nelson Act and the act of selling lands to non-Indian settlers cannot be construed as a grant of state tax jurisdiction. Moreover, the exercise of state tax jurisdiction over the prior non-Indian owners of such lands did not terminate federal and tribal jurisdiction, or the Band's tax immunity.

Federal preemption is not the sole source of the tax-exempt status of reservation lands. The tax-exempt status of reservation lands is derived from treaties and the unique political status of tribes. Thus, the absence of federal control over reservation lands combined with the exercise of state jurisdiction over non-Indians within the reservation cannot alter the tax-exempt status of reservation lands. Furthermore, this Court has refused to apply a preemption analysis to determine the tax-exempt status of reservation lands. *County of Yakima v. Yakima Nation*, 502 U.S. 251, 258 (1992).

¹ Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief *amicus curiae*. Their letters of consent have been filed with the Clerk of Court.

Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

Pursuant to treaties between the Band and the federal government, all lands within the Leech Lake Reservation were separated from the tax jurisdiction of the State. There is no convincing language in the Nelson Act evidencing an intent by Congress to diminish the reservation, restore reservation lands to the public domain, or to end federal responsibility for such lands, and thereby separate these lands from the reservation. Thus, the State has never been granted exclusive tax jurisdiction over the lands in question.

The Nelson Act served a limited purpose – to permit surplus unallotted lands to be sold as pine lands or subject to entry under the homestead laws. The Nelson Act itself did not terminate tribal ownership of reservation lands. The sale of surplus unallotted lands within the Leech Lake Reservation was uncertain, and thus there was a possibility that tribal ownership would continue. Knowing that tribal ownership could continue, had Congress intended the Nelson Act to grant states exclusive tax jurisdiction over the lands in question it would have included language in the Act to that effect. Under the canons of construction applicable in Indian law, state taxation of surplus unallotted lands was invalid before the sale of such lands, and for the same reasons cannot be permitted now that the Band has reacquired ownership of such lands.

ARGUMENT

I. IN RECOGNITION OF THE PLENARY AUTHORITY OF THE FEDERAL GOVERNMENT OVER TRIBES AND TRIBAL SOVEREIGNTY, TRIBES ARE IMMUNE FROM STATE TAXATION OF RESERVATION LANDS.

State taxation of reservation lands created by treaty and executive order cannot be justified using a preemption analysis, notwithstanding the National Association of Counties and the National Governors' Association's ("Associations") argument that preemption is the sole source of the tax-exempt status of reservation lands. Thus, the removal of a federal restriction, or the absence of federal control with respect to reservation land does not impliedly subject such land to state taxation. If this were the law, state and local governments could challenge the tax-exempt status of any reservation land on preemption grounds, whenever the federal government fails to exercise sufficient control.

Essentially, the Associations have asked the Court to apply the jurisdictional test set forth in *Williams v. Lee*, 358 U.S. 217 (1959). In that case, the Court held that state laws applied within the boundaries of an Indian reservation, unless preempted by federal law or unless such laws infringed upon tribal self-government. This Court has refused to apply the *Williams* test to determine the tax-exempt status of reservation lands, however. *County of Yakima*, 502 U.S. at 258. In the area of taxation, the Court has adopted a categorical approach: states are without jurisdiction to tax reservation lands absent congressional consent. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973).

Cass County fails to recognize that the tax-exempt status of reservation lands derives from treaties. *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1866); *The New York Indians*, 72 U.S. (5 Wall.) 761 (1866). Consequently, state taxation of reservation lands is not preempted in the usual sense, i.e. by over-riding federal control or laws, because the tax-exempt status of such lands was already secured by treaty. Rather, state tax jurisdiction is said to be preempted only in the sense that state taxation of reservation lands is barred unless Congress has expressed its consent. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973). That is, until Congress explicitly grants jurisdiction to state governments to tax reservation lands, state taxation is forbidden. Congressional consent is required because the federal government has exclusive jurisdiction over reservation lands. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985).

A. The Tax-exempt Status of Reservation Lands Arises Out Of The Unique Political Status of Tribes.

Generally, Indian treaties contemplated that reservations would not be included within the territorial limits or jurisdiction of the states. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832). The Court found that this implied guarantee prohibited state taxation of reservation lands. *The Kansas Indians*, 72 U.S. (5 Wall.) at 752; *The New York Indians*, 72 U.S. (5 Wall.) at 766-67. Chief Justice Marshall resolved that the federal government had completely excluded state jurisdiction over Indian reservations through the treaty-making process:

The Cherokee Nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with acts of Congress.

Worcester, 31 U.S. at 561. This policy of federal preemption has been modified to allow some state regulatory and adjudicatory jurisdiction over activities on reservation lands, but remains in full force with respect to the taxation of reservation lands. *Mescalero Apache Tribe*, 411 U.S. at 148 (summarizing *McClanahan*, 411 U.S. 164).

In the late 1800s, the Court found that reservation lands set aside during the treaty period were exempt from state taxation. Lands held in common, severalty, and fee were exempt from state taxation based on the unique political status of the tribes: "As long as the United States recognizes their national character they are under the protection of treaties and the laws of Congress, and their property is withdrawn from the operation of state laws." *The Kansas Indians*, 72 U.S. at 757.

In *The New York Indians*, land was conveyed by the Seneca Nation by treaty to non-Indians (hereafter "grantees"), but the Seneca Nation was permitted to occupy the reservation for a period of five years before removal to the West. 72 U.S. at 767. The treaty provided that the Seneca Indians would hold title to the reservation in fee as joint tenants for a period of five years. *Id.* Once the Senecas were removed from the reservation, the whole title in fee was to pass to the grantees. *Id.* Under a

new treaty, however, the conveyance was cancelled, and a new deed executed between the Seneca Nation and the grantees under which it was agreed that the Seneca Nation would remain in possession of the reservation, and the grantees would retain a "right of pre-emption." *Id.* at 763. The Court held that taxation of the reservation lands was "premature and illegal," including those taxes imposed when title to reservation lands was held in fee by the grantees. *Id.* at 770. The right to occupy the reservation by the Seneca Nation, which had been guaranteed by treaty, provided the basis for the tax-exempt status of all lands within the reservation. The Court stated: "[T]he right of occupancy creates an indefeasible title to the reservation that may extend from generation to generation, and will cease only by dissolution of the tribe. . . ." *Id.* at 771.

Likewise, in *The Kansas Indians* it was the political status of the Tribe of Shawnee Indians and its right of occupancy that rendered reservation lands tax-exempt, regardless of whether reservation lands were held in severalty or in common. 72 U.S. at 755. There, the treaties with the Shawnee did not address whether division of the reservation into separate estates changed the tax-exempt status of such lands. *Id.* The Court recognized that, even in the absence of explicit treaty guarantees regarding taxation, reservation lands originally set aside by treaty would remain tax-exempt:

If the tribal organization of the Shawnees is preserved intact, and recognized by the political department of the government as existing, then they are a "people distinct from other," capable

of making treaties, separated from the jurisdiction of Kansas, and to be governed by the government of the Union. If under the control of Congress from necessity there can be no divided authority. If they have outlived many things, they have not outlived the protection afforded by the Constitution, treaties and laws of Congress.

Id. at 755-756. The continued political existence of the Shawnees and their treaty guarantees precluded state taxation of reservation lands.

Tribes do not enjoy immunity from state real property taxes "only derivatively from federal tax immunity" as suggested by the Associations. (Associations' Brief, at 18) This Court has already held that the federal immunity-or-instrumentality doctrine no longer applies to Indians or their lands. *Mescalero Apache Tribe*, 411 U.S. at 150. Under that doctrine, the federal government was viewed as owning tribal and individual lands, so it shared its tax immunity with tribes. *See United States v. Rickert*, 188 U.S. 432, 438-39 (1902) (holding that states may not interfere with the powers vested in Congress under the Property Clause). In *Mescalero Apache Tribe*, the Court recognized that tribal tax immunity actually arises out of the unique political status of tribes, and that federal ownership of tribal lands was irrelevant. Hence, "the 'mere fact that property is used among others, by the United States as an instrument for effecting its purpose does not relieve it from state taxation.'" *Mescalero Apache Tribe*, 411 U.S. at 151, citing *Choctaw, Oklahoma & Gulf R. Co. v. Mackey*, 256 U.S. 531, 536 (1921).

That tribal tax immunity arises out of the unique political status of tribes is illustrated by a case in which the Court held that Indians of the Five Civilized Tribes lacked tribal autonomy, because there was little to distinguish them from other state citizens. *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598 (1943). Consequently, the restricted lands owned by tribal members and the proceeds derived from such lands were not assumed to be tax-exempt, and the members were required to establish that state taxes had been explicitly exempted by Congress.² By holding that the tribal members in that case no longer belonged to tribes having a separate political existence, the Court implied that tribes having a visible existence should and would enjoy immunity from state taxation.

For tribes maintaining a separate political existence, the tax-exempt status of reservation lands is preserved until extinguished by Congress. The tribal organization of the Leech Lake Band and its reservation was created by a series of treaties dating from 1854 and by an executive order in 1874, and has remained intact. *Leech Lake Band v. Cass County*, 108 F.3d 820, 821 (8th Cir. 1997). Therefore, Cass County must show that Congress has unmistakably granted authority to the County to tax reservation lands originally sold to non-Indians under the Nelson Act of January 14, 1889, ch. 24, 25 Stat. 642 (1989) (hereafter "Nelson Act").

² Similarly, in *Goudy v. Meath*, 203 U.S. 146 (1906), an express exemption from tax was required because Goudy had severed his tribal relations and lost his inherent right as an Indian to be free from state taxation.

The tax-exempt status of reservation lands excluded from the territorial jurisdiction of the state does not extend to non-Indians. With respect to non-Indian lands, tax-exemptions may not be implied. In *Thomas v. Gay*, the Court held that the state's taxing jurisdiction was coextensive with its legislative and territorial jurisdiction. Under Oklahoma's Organic Act, the state was granted legislative power over "all rightful subjects of legislation." 169 U.S. 264, 271-272 (1889). Unlike the tribe or its members, non-Indian cattle owners were "rightful subjects" of taxation, and were thus subject to state taxation. In *Rickert*, the Court held: "All subjects over which the sovereign power of the state extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation." 188 U.S. at 438.

The Nelson Act did not expressly exempt non-Indians, who were "rightful subjects" of legislative power, from state taxation. Therefore, Congress' failure to exempt non-Indian ownership of reservation lands from state taxation does not mean that Congress authorized the County to tax tribal ownership of the lands in question here.

B. Tribes Are Separated From The Tax Jurisdiction Of The State Because The Constitution Vests The Federal Government With Exclusive Authority Over Relations With Indian Tribes.

Cass County's assertion of tax jurisdiction over lands held by the Leech Lake Band within its reservation is

ultimately restrained by Article I, § 8, cl 3 of the Constitution, which grants the Federal government exclusive authority over relations with Indian tribes. *Montana v. Blackfeet*, 471 U.S. at 764. As a result, states lack jurisdiction to tax reservation lands. Only Congress has the power to modify or remove restrictions on the taxability of tribal lands. *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980) (holding tribal sovereignty dependent and subordinate to only the federal government, not the states). In deference to the exclusive authority of the federal government over Indian affairs, the Court has never found that Congress has abdicated its exclusive authority over tribal lands in the absence of a clear expression of intent to relinquish such jurisdiction. *Montana v. Blackfeet*, 471 U.S. at 765. Thus, the Court has consistently held that "absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands . . . absent Congressional consent." *Mescalero Apache Tribe*, 411 U.S. at 148, citing *McClanahan*, 411 U.S. 164.

In a case analogous to *Leech Lake Band*, the Court held that statutes relinquishing federal jurisdiction to the states will be narrowly construed as relinquishing jurisdiction only with respect to those laws specifically identified in the statute. *Menominee Tribe v. United States*, 391 U.S. 404 (1968). There, the Court held that treaty rights to hunt and fish free from state regulation were not abrogated by a termination Act that contained no "explicit statement" demonstrating unmistakable intent to extinguish such rights.

The Menominee Termination Act of 1954, 25 U.S.C. § 899 (1954), provided that "all statutes of the United

States which affect Indians . . . shall no longer be applicable to members of the tribe." *Id.* at 412. Because the term "treaty" was not expressly mentioned as one of the federal laws no longer applicable to members of the Tribe, however, the Court declined to infer that Congress had terminated the Tribe's treaty rights. *Id.* at 412-413.

The Nelson Act should be construed in the same manner as the Menominee Termination Act. The Court cannot imply that the Leech Lake Band's tax immunity within its reservation was extinguished, absent any reference to taxation in the Nelson Act.

The tax-exempt status of reservation lands is not dependent upon whether the federal government retained or exercised exclusive jurisdiction over Indian allottees or the prior non-Indian owners of the lands at issue. What matters is that the Nelson Act did not expressly terminate the Leech Lake Band's treaty-based tax immunity with respect to lands within its reservation. The Court in *Menominee* applied the unmistakable intent rule of construction even though the statute terminated the federal trust relationship with the Tribe. Thus, the removal of federal protection and relinquishment of jurisdiction to the state did not preclude the Menominee Tribe from exercising its treaty rights free from state regulation. Similarly, the removal of restrictions on alienation under the Nelson Act should not bar the Leech Lake Band from asserting its tax immunity, derived from treaties with the Band, with respect to lands that still remain a part of its reservation.

II. THE NELSON ACT DID NOT DIMINISH THE LEECH LAKE RESERVATION OR ALTER THE TAX-EXEMPT STATUS OF RESERVATION LANDS OVER WHICH THE FEDERAL GOVERNMENT AND THE TRIBE HAVE ALWAYS RETAINED JURISDICTION.

Although Congress clearly intended to remove restrictions on alienation with respect to the lands at issue, it did not unmistakably intend to terminate all federal control and protection of such lands by passing the Nelson Act. Once a reservation is established all lands within remain a part of the reservation until Congress unequivocally removes them. *United States v. Celestine*, 215 U.S. 278, 285 (1909). The Nelson Act was a regulatory act that interfered with tribal possession, but did not diminish or disestablish the Leech Lake Reservation.³ Because allotted and fee lands within the Leech Lake Reservation remain "Indian country", federal supremacy and tribal jurisdiction was never terminated with respect to such lands. *Seymour v. Superintendent*, 368 U.S. 351 (1962) (holding that land owned by non-Indians in fee is still "Indian country").⁴

³ Restraints on alienation and exclusive control over lands subject to original Indian title constitute federal regulatory action under the Indian Commerce Clause. See Felix S. Cohen, *Handbook of Federal Indian Law*, 514 (1982 ed.).

⁴ "If the lands in question are within a continuing 'reservation,' jurisdiction is in the tribe and the Federal Government 'notwithstanding the issuance of any patent . . .'" *DeCoteau v. Tenth Judicial District*, 420 U.S. 425, 421 n.2 (1975), quoting 18 U.S.C. 1151(a).

Congressional power over tribal lands is not dependent upon "either federal claims to an interest in land owned by tribes or the tenure by which the tribal land is held." *Handbook of Federal Indian Law* at 515. In *Oneida Indian Nation v. County of Oneida*, the fact that the United States never held fee title to the lands at issue "did not alter the doctrine that federal law, treaties, and statutes protected Indian occupancy and that its termination was exclusively the province of federal law." 414 U.S. 661, 670 (1974). Thus, the right of a tribe to occupy lands originally set aside by treaty must be expressly terminated and is not affected by the manner in which tribal land is held. The transfer of title and possessory rights to non-Indians under the Nelson Act does not relieve Cass County of the need to identify express congressional language in the Nelson Act that unmistakably shows the Leech Lake Band would be subject to state tax jurisdiction if it regained title and asserted its rights of occupancy to the lands originally sold under that Act.

Only if the Nelson Act had diminished or disestablished the Leech Lake Reservation, would Cass County be able to justify its assertion that the Nelson Act impliedly subjected tribal ownership of surplus unallotted lands to state taxation. The Eighth Circuit Court of Appeals and Minnesota courts, however, have consistently recognized that the Nelson Act did not diminish or disestablish reservations of the various bands of the Minnesota Chippewa Tribe. *Leech Lake Band v. Cass County*, 908 F. Supp. 689, 691 (D. Minn. 1995), *aff'd in part*, 108 F.3d 820, 821-22 (8th Cir. 1997), *citing with approval*, *Leech Lake Band v. Herbst*, 334 F. Supp. 1001, 1002 (D. Minn. 1971), and *State v. Forge*, 262 N.W.2d 341, 343-44 (Minn. 1977). The Eighth

Circuit determined that "[a]lthough the pattern of land ownership within the reservation has varied over the years, the reservation has never been disestablished or diminished." *Leech Lake Band*, 108 F.3d at 821-22.

In the most recent diminishment and disestablishment case, the Court applied a three-part test to determine whether Congress expressed its unequivocal intent to change or abolish reservation boundaries. *Hagen v. Utah*, 510 U.S. 399 (1994). The Court examined (1) "the statutory language used to open the Indian lands," (2) "the historical context surrounding the passage of the surplus land Acts," and (3) "subsequent demographics," or "who actually moved onto opened reservation lands." *Id.* at 411. This is precisely the test that was applied in *Herbst*.

In *Herbst*, the court held: (1) As in *Seymour v. Superintendent*, there is no language in the Nelson Act "vacating the reservation and restoring the land to the public domain," (2) "it is apparent in light of events before and after the passage of the Nelson Act that its purpose was not to terminate the reservation or end federal responsibility for the Indian," and (3) "[l]ess than one-fourth of the [Leech Lake] Indians actually moved off the reservation. The rest remained and many of them accepted allotments on the Leech Lake Reservation where they and their descendants continue to live." *Herbst*, 334 F. Supp. at 1004-5.

Finally, the Nelson Act does not provide for a "sum certain" payment in exchange for lands, another requirement for diminishment. Compare *DeCoteau v. District Court*, 420 U.S. at 448 (citing "gross differences" between

congressional acts that open land for settlement and agreements that "vest in the tribe at sum certain - \$2.15 - per acre.")⁵ The Nelson Act merely anticipated that the reservation would be opened for the purpose of selling unallotted surplus lands on behalf of the Leech Lake Band. *Herbst*, 334 F. Supp. at 1004. This Court has consistently held that such an arrangement does not diminish or disestablish reservation boundaries. *Mattz v Arnett*, 412 U.S. 481 (1973); *Seymour v. Superintendent*, 368 U.S. at 351.

Not only did the Nelson Act fail to diminish or disestablish the Leech Lake Reservation, but it did not terminate the Leech Lake Band's tax immunity with respect to pine and homestead lands sold to non-Indians under the Act. Congress could not have intended the removal of restrictions on alienation under the Nelson Act to apply to tribes or subject tribal ownership of lands to state taxation, because there was a possibility that such lands would never be sold. Sections 4, 5 and 6 of the Nelson Act permitted surplus lands to be sold as pine lands or subject to entry under the homestead laws. As was the case in *Mattz*, 412 U.S. 481, the sale of surplus lands within the Leech Lake Reservation was uncertain. Due to this uncertainty, the Court in *Mattz* concluded that the Tribe had not ceded all of its claim, right, title and interest in the surplus lands. See *DeCoteau*, 420 U.S. at 448.

⁵ The Nelson Act provides for an appropriation of one-hundred and fifty-thousand dollars, or "so much thereof as may be necessary" to fulfill the purposes of the Act. 25 Stat. 612, ch. 24, § 8. This is not a bilateral agreement providing for a sum certain per acre for each reservation.

The Nelson Act could not have subjected surplus lands to state taxation in light of the fact that tribal ownership of such lands could continue. Given that tribal ownership of surplus lands within the Leech Lake Reservation would continue unless sold, this Court cannot allow state taxation unless it finds that the Nelson Act expressly authorized state taxation of tribally-owned lands.

CONCLUSION

For the foregoing reasons, *Amici Curiae*, the Grand Portage Band of Chippewa, the Sisseton-Wahpeton Sioux Tribe, and the Red Lake Band of Chippewa respectfully request that the Court affirm the judgment of the Eighth Circuit Court of Appeals.

Respectfully submitted,

VANYA S. HOGEN-KIND,

Counsel of Record

SUSAN L. ALLEN

BLUEDOG, OLSON & SMALL, P.L.L.P.

Southgate Office Plaza, Suite 500

5001 West 80th Street

Minneapolis, Minnesota 55437

Telephone (612) 893-1813

Attorneys for Amici Curiae

11

JAN 15 1998
CLERK OF THE COURT

No. 97-174

In The
Supreme Court of the United States
October Term, 1997

CASS COUNTY, MINNESOTA, et al.,
Petitioners,
v.

LEECH LAKE BAND OF CHIPPEWA INDIANS,
Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Eighth Circuit

BRIEF OF THE
CONFEDERATED TRIBES AND BANDS OF THE
YAKAMA INDIAN NATION AS *AMICI CURIAE*
IN SUPPORT OF RESPONDENT

TIM WEAVER
Counsel of Record
COCKRILL & WEAVER, P.S.
P. O. Box 487
Yakima, WA 98907
(509) 575-1500

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

16pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE <i>AMICI CURIAE</i>	1
STATEMENT OF THE CASE.....	2
SUMMARY OF ARGUMENT.....	3
ARGUMENT	4
I. THE FACTS DEVELOPED IN THE REMAND OF COUNTY OF YAKIMA V. YAKAMA NATION REFLECT THAT THE LOSS OF TAX REVENUES FROM TRIBAL FEE LANDS HAS A <i>DE MINIMIS</i> IMPACT ON COUNTY BUDGETS	4
II. UPHOLDING THE DECISION BELOW WILL NOT BESTOW AN UNJUSTIFIED TAX ADVAN- TAGE ON TRIBAL GOVERNMENTS, OR NON- INDIAN CITIZENS DOING BUSINESS WITH THEM, TO THE DETRIMENT OF COUNTIES OR THEIR CITIZENS.....	6
A. Primary Income Generating Assets of Tribes Are Generally held in Trust Status	6
B. Off-Reservation Development of Fee Lands Poses No Threat to Counties' Tax Base	7
C. On-Reservation Fee Land Development of the Magnitude Contemplated by Petitioner is Unlikely	9
CONCLUSION	11

TABLE OF AUTHORITIES

Page

CASES

<i>Brendale v. Confederated Tribes and Bands of Yakima Nation</i> , 492 U.S. 408, 106 L.Ed.2d 343, 109 S.Ct. 2994 (1989)	1
<i>County of Yakima v. Yakama Nation</i> , 502 U.S. 251 (1992)	<i>passim</i>
<i>Mescalero Apache Tribe v. Jones</i> , 411 U.S. 145 (1972)	3, 8
<i>Oklahoma Tax Commission v. Citizens Band Potawatomi Indian Tribe</i> , 498 U.S. 505 (1991)	3, 11
<i>Rice v. Rehner</i> , 463 U.S. 713 (1983)	3, 11
<i>Washington v. Confederated Tribes of the Colville Reservation</i> , 447 U.S. 134 (1980)	3, 11

STATUTES AND TREATIES

National Indian Gaming Regulatory Act, 25 U.S.C. § 465	7, 8, 9
§ 2701	4
§ 2703	7
§ 2710	6, 7, 9
Treaty with the Yakamas, 12 Stat. 951	1

INTEREST OF THE AMICI CURIAE¹

The Confederated Tribes and Bands of the Yakama Indian Nation (hereafter "Yakama" or "Yakama Nation") is a Federally recognized Indian Tribe, pursuant to its Treaty with the United States of America, June 9, 1855 (Treaty with the Yakamas 12 Stat. 951). The Yakama Nation has 9,004 enrolled members, approximately one-half of whom reside on the 1.3 million acre Yakama Reservation in Central Washington State.²

The Yakama Nation, through a land purchase program, has been steadily re-acquiring Reservation fee lands when they become available for purchase. As set forth in Footnote One, additional lands have been acquired since this Court's decision in *County of Yakima v.*

¹ The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

² "The Yakima Indian Reservation, which was established by treaty in 1855, (see Treaty with Yakima Nation, 12 Stat. 951) covers approximately 1.3 million acres in southeastern Washington State. Eighty percent of the reservation's land is held by the United States in trust for the benefit of the Tribe or its individual members; 20 percent is owned in fee by Indians and non-Indians as a result of patents distributed during the allotment era. See *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408, 415, 106 L.Ed.2d 343, 109 S.Ct. 2994 (1989) (plurality opinion). Some of this fee land is owned by the Yakima Indian Nation itself." *County of Yakima v. Yakama Nation*, 502 U.S. 251, 256 (1992). Tribal Government and Tribal member owned fee land represents approximately 50% of the fee lands on the Reservation.

Yakama Nation, 502 U.S. 251 (1992), but the most significant purchases of fee acreage occurred prior to that decision. As this Court noted in that opinion, some of this land is owned by the Yakama Indian Nation as a government. Over time this percentage is increasing, as Yakama buys fee interests from tribal and non-tribal members alike. The Yakama Nation has a specific interest in consolidating its Reservation land base for the benefit of its members yet unborn to insure the continued vitality of the Tribe and its resources.

The primary interests of the Yakama Nation in this proceeding are to rebut the "tax disaster" scenario set forth by the Petitioner's *amici* National Association of Counties by: One, demonstrating to this Court by the facts established in the remand in *County of Yakima, supra*, that Yakima County's inability to tax the fee parcels there in question, had a *de minimis* impact on the County budget, and, two, to reassure this Court that a ruling upholding the decision below will not result in an unjustified tax windfall for Tribal governments.

STATEMENT OF THE CASE

Yakama accepts the Statement of the Case as set forth in the Brief for the Respondent Leech Lake Band of Chippewa Indians.

SUMMARY OF ARGUMENT

On remand of this Court's ruling in *County of Yakima, supra*, the County determined that there were 577 parcels of fee land owned by the Tribe and its members which were subject to County *Ad Valorem* taxes.³ Six tax years, 1989 through 1994, were in dispute in that remand. The primary remand issue ultimately was whether the County could recover on past due taxes for those years. During those years the Yakima County budgets were in the neighborhood of 70 million dollars per year.⁴ For the six-year period in question the entire tax bill for tribal lands was \$1,307,986.00 (see memo from Yakima County Treasurer dated April 1, 1994, attached hereto as Appendix 1), representing less than .035% of the County budget for the years in question. Not even the most tenacious "budget-hawk" can claim that such a minuscule amount can in any way harm the overall services provided by the County, particularly not in the manner alleged by *amici* National Association of Counties.

The rulings of this Court in such cases, such as *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980) (to which case the Yakama Nation was also a party), *Rice v. Rehner*, 463 U.S. 713 (1983), *Oklahoma Tax Commission v. Citizens Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991), and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), together with Federal legislation such as

³ Due to the complexities of title records, it is uncertain that this is the correct number of parcels. The Yakama Nation believes it may be in excess of 700 different parcels.

⁴ Telephonic communication with the Yakima County Auditor by this writer's legal assistant on January 7, 1998.

the National Indian Gaming Regulatory Act, 25 U.S.C. 2701, *et seq.*, mitigate the "unfair economic advantage" arguments made by *amici* National Association of Counties in the latter portions of its brief.

While Yakama and the Respondent Leech Lake Band believe these economic based arguments are irrelevant to the legal issue here before the Court, both believe it is important for the Court to be assured that, by affirming the Court below, it is not creating the scenario claimed by the Petitioner and its *amici*.

ARGUMENT

I. THE FACTS DEVELOPED IN THE REMAND OF COUNTY OF YAKIMA V. YAKAMA NATION REFLECT THAT THE LOSS OF TAX REVENUES FROM TRIBAL FEE LANDS HAS A *DE MINIMIS* IMPACT ON COUNTY BUDGETS.

Petitioner and its numerous *amici* hypothesize all manner of dire consequences for County revenues should this Court uphold the decision below. Those hypotheses are based upon pure speculation and the worst possible "list of horrors" that could be imagined, and assumption of large, untaxed Tribal development.

The only case that has dealt with the specifics of an entire Reservation-wide analysis of County tax revenue from *Ad Valorem* taxation of tribal fee parcels occurred in the remand of the *County of Yakima, supra*, case. The facts developed there indicate a non-existent impact on the overall County budgets involved. As shown in Appendix 1, Yakima County's records reflect 577 parcels of tribal

and tribal member owned fee lands on the Yakama Reservation. The total tax bill for these 577 parcels, for the six tax years 1989-1994⁵ was \$1,307,986.54. Simply dividing by those six years results in a yearly tax revenue of \$217,997 for the entire 577 parcels. During that six-year period, the average Yakima County operational budget was \$67,775,384.⁶ Simple math then indicates that taxation of 577 parcels – here the Court deals with seven parcels at Leech Lake – on the Yakama Reservation represented only .035% of the entire County budget for the years in question. Of course, as this Court recognized at Page 256 of the *County of Yakima* opinion, *supra*, (cited at Footnote 1 herein), only a portion of those 577 parcels were owned by the Tribal Government, thereby further minimizing any impact on County revenue should the Court uphold the decision below.

As the simple analysis above indicates, in the one case that has actually dealt with the issue, the loss to County revenues through non-taxability of Tribal Government owned fee lands is *de minimis* at best. Petitioner and its *amici's* arguments, based solely on their speculation, rather than hard facts such as those reflected above,

⁵ Even though the *County of Yakima* litigation was commenced in 1988, taxes for that year were not included in the Appendix 1 calculations, as those taxes were not specifically at issue on the remand.

⁶ These figures were obtained by telephonic conference with the Yakima County Auditor's Office. The figure used is the average budget. The yearly budgets are as follows: 1989 – \$59,398,186; 1990 – \$54,493,208; 1991 – \$63,468,728; 1992 – \$74,979,149; 1993 – \$77,842,475; 1994 – \$81,468,960.

are at the very least suspect, and should be so viewed by this Court.

II. UPHOLDING THE DECISION BELOW WILL NOT BESTOW AN UNJUSTIFIED TAX ADVANTAGE ON TRIBAL GOVERNMENTS, OR NON-INDIAN CITIZENS DOING BUSINESS WITH THEM, TO THE DETRIMENT OF COUNTIES OR THEIR CITIZENS.

A. Primary Income Generating Assets of Tribes Are Generally Held in Trust Status.

Petitioner and its *amici* assert that without a "bright line" for taxability of Tribal government lands, that those governments may create significant developments on fee lands free from County taxation. They argue that such a situation both denies the County its property taxes, and allows Tribes to have an unfair competitive advantage over the Counties' citizens. In the same breath, however, they admit that the most significant recent Tribal economic development has been in the arena of Tribal gaming (National Association of Counties Brief, P. 21), which is already Federally regulated, and in every instance known to this writer, conducted on lands held in trust, thereby preventing County *Ad Valorem* taxation in any event. Further, the Gaming Act, 25 U.S.C. 2710(d)(4), specifically exempts Tribal Gaming from State taxation. It is simply unrealistic to assume that Tribal governments, or the Federal government will alter this scenario in the future. Certainly affirmance of this decision poses no threat to County economics in the gaming arena.

Further, in the case of casino development, States and Counties are afforded some degree of protection under

the Tribal-State compacting provision of 25 U.S.C. 2710(d)(3)(C)(iii). That provision allows for the negotiation of cost sharing that could be used to defray the Counties' loss of tax revenue. Obviously that provision is not mandatory, but is certainly one that gives Counties and States some degree of leverage in the casino arena. As is noted *infra* in Section IIC, Petitioner and *amici* can point to no other actual significant Tribal development on fee land that would impact Counties.

B. Off-Reservation Development of Fee Lands Poses No Threat to Counties' Tax Base.

Again, the principal area of off-reservation development, in recent years, has been in the casino arena. Under the Federal Gaming Act, no casino can be developed unless it is located on "Indian Land," which is defined in the Gaming Act as either land within a reservation, or land that is held in trust or restricted status. 25 U.S.C. 2703(4). Accordingly, any development off reservation for gaming purposes would require a 25 U.S.C. 465 trust conversion, a process which appears to satisfy the Petitioner and its *amici* (National Association of Counties Brief, Pgs. 21-23).⁷

⁷ The National Association of Counties, at Pages 22 and 23 of their Brief, and in Footnote 20, cite various scenarios from newspaper clippings in an effort to make its point. Those citations, of course, give the reader no information as to where those lands are located - on or off reservation - or whether the proposed uses would require 25 U.S.C. 465 fee to trust conversions prior to having any potential impact on a County's tax base.

As to other off-reservation uses to which Tribal governmental property could be put, decisions of this Court at least point the way for Counties to proceed.

In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1972), this Court dealt with the issue of State taxation of off-reservation activities by a Tribal government. Obviously, *Mescalero, supra*, did not deal with every possible issue that could arise, but should provide relatively clear direction. First and foremost, *Mescalero, supra*, makes clear that, contrary to the Counties' arguments, Tribes cannot proceed with off-reservation businesses with impunity. In *Mescalero, supra*, this Court found that even though the land in question was held in trust or restricted status, the Tribe was still subject to New Mexico's gross receipts tax. *Mescalero, supra* at 157.

Petitioner and its *amici's* scenario – that the Tribe could have off-reservation lands in fee and still proceed on some tax-free basis – simply does not square with the ruling in *Mescalero*. Under *Mescalero*, there was action taken under 25 U.S.C. 465 which protected the off-reservation Tribal land from *Ad Valorem* taxation. While the *Mescalero* opinion does not address the issue, if the land there had been held by the Tribe in fee simple status, it would have been problematic for the Tribe to claim a tax exemption.⁸ The situation described by the Petitioner and

⁸ It is also almost inconceivable that a Tribal government would commit a sizeable investment outside its reservation without ensuring that the status of the site to be developed would be tax free under the statutory remedies available to it under § 465. To do otherwise simply invites further challenge by non-Tribal governments, with the resultant controversy and

its *amici* is highly unlikely at best, and any tax exemption for off-reservation fee land is extremely problematic for the Tribal government involved.

C. On-Reservation Fee Land Development of the Magnitude Contemplated by Petitioner is Unlikely.

As noted previously, most Tribes' largest economic developments are presently tied to casinos and their resultant development. In that instance, the Gaming Act specifically exempts Tribal on-reservation gaming from State taxes. 25 U.S.C. 2710(d)(4). Accordingly, the largest and most lucrative Tribal developments are already protected from State and County taxation by specific Federal action.

Here again, Petitioner and its *amici* deal solely in speculation as to what might occur if some small number of Tribal government owned fee lands were not subjected to County property taxes. It is certainly more proper to look at this issue from the standpoint of what has occurred regarding Tribal fee land development prior to the decision in *Yakima County, supra*, than the Petitioner's standpoint of what might happen if the decision below is upheld.

Neither Petitioner nor its *amici* point to one specific instance of substantial fee land development by an Indian government prior to this Court's *County of Yakima* opinion, in spite of the fact that many States and Counties did

potential business disruption. Use of the § 465 option satisfies the counties interests. See FN. 7.

not impose *Ad Valorem* taxes on such properties prior to that decision.⁹

Petitioner and its *amici* point to no case of substantial Tribal development on any Tribally owned fee lands. They point to no situation that comes close to those that they now urge are certain to occur if the decision below is affirmed. There is simply no showing that affirmance will lead to unfettered Tribal development on fee lands. From a purely practical standpoint, it is likely to assure that Tribal governments, as well as anyone who might be financing them, would be reluctant to commit large sums to develop fee land even if there is an affirmance. As this case reflects, non-Indian society is relentless in its efforts to stifle Tribal development. Should this be an affirmance here, as there should be, this write doubts that the majority society will let that ruling rest. Under those circumstances, it is doubtful that Tribes will commit to develop fee lands, even if they so desired.¹⁰

⁹ As the record in *Yakima County, supra*, reflects, at least the States of Idaho, Oregon and Arizona did not assess *Ad Valorem* taxes against Tribally owned fee lands. This writer also understands from a discussion with counsel for Respondents that Cass County was assessing no taxes on these parcels prior to the *Yakima County* case.

¹⁰ This, of course, presupposes that Tribal governments follow the same philosophy of land development and exploitation sought by non-Indians. As the vast majority of Reservations retain their rural and undeveloped character, it would seem clear to the Court that Tribes have a different view of the land than that of the White majority. Retaining the land base is of utmost importance to Tribes. Developing it simply because it can be developed is not. Perhaps that is why *amici* for Petitioner cannot identify a case that fits their speculative list of horrors.

Further, this Court's decisions in *Washington, supra*, *Rice, supra*, and *Oklahoma Tax Commission, supra*, placing some limits on on-Reservation Tribal businesses reflect that Tribal business activities may not go forward in the totally unfettered mode set forth by Petitioner and its *amici*.

CONCLUSION

Yakama realizes that the factual arguments made by Petitioner and its *amici* are irrelevant to the decision of this case. However, those arguments, as presented by Petitioner and *amici* create a distinct impression that affirmance could lead to serious economic consequences for County government. As noted herein, those concerns are speculative and, at the very least, highly inflated.

In the one case on record regarding this specific issue – the remand in the *Yakima County* case – it is readily apparent that even with a large number of fee parcels involved, the tax consequences to the County do not rise even to the level of background noise. Petitioner and *amici* point to no specific instance of Tribal development of non-taxed fee land that has had any specific impact on County funding. Their allegations are highly speculative and are employed solely as a scare tactic. This Court should ignore their arguments and concentrate solely

upon the legal merits of this case in reaching an affirmation of the decision below.

Respectfully submitted,

TIM WEAVER
 COCKRILL & WEAVER, P.S.
 316 North Third Street
 P. O. Box 487
 Yakima, WA 98907
 (509) 575-1500

APPENDIX 1

[LOGO]

YAMIKA COUNTY TREASURER

128 N. 2nd St. Room 115 P.O. BOX 1408 YAKIMA, WA
 98907-1408

NANCY E. DAVIDSON - COUNTY TREASURER
 ILENE THOMSON - ASSISTANT TREASURER

MEMO

TO: Nancy Davidson, County Treasurer
 FROM: David Bleckinger, Acct. Supervisor
 Toni Bowron, Tax Division Supervisor
 DATE: April 1, 1994
 SUBJECT: Yakama Indian Nation Litigation

Below is breakdown of taxes, interest, penalty, administrative costs and assessments for those 577 parcels designated as belonging to Yakama Indian Nation members. We have calculated interest through April, 1994.

Taxes	\$ 1,307,986.54
Interest	436,763.43
Penalty	97,086.17
Admin. Costs	38,662.63
Assessments	<u>34,541.76</u>
TOTAL	\$ 1,915,040.53

The parcel paid on the attached receipt number 131631 was processed after the statements prepared for the court. This resulted in the dollar amount needing to be lowered by \$5,747.33.

18

JAN 20 1998

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

CASS COUNTY, MINNESOTA; SHARON K. ANDERSON, in her official capacity as Cass County Auditor; MARGE L. DANIELS, in her official capacity as Cass County Treasurer; STEVE KUHA, in his official capacity as Cass County Assessor; JAMES DEMGEN, in his official capacity as Cass County Commissioner; JOHN STRANNE, in his official capacity as Cass County Commissioner; GLEN WITHAM, in his official capacity as Cass County Commissioner; ERWIN OSTLUND, in his official capacity as Cass County Commissioner; VIRGIL FOSTER, in his official capacity as Cass County Commissioner,

Petitioners,

vs.

LEECH LAKE BAND OF CHIPPEWA INDIANS,

Respondent.

*On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit*

**BRIEF OF AMICUS CURIAE SAGINAW CHIPPEWA INDIAN
TRIBE OF MICHIGAN IN SUPPORT OF RESPONDENT LEECH
LAKE BAND OF CHIPPEWA INDIANS**

FRANK R. JOZWIAK

Counsel of Record

K. ALLISON McGAW

MORISSET, SCHLOSSER, AYER
& JOZWIAK*Attorneys for Amicus Curiae Saginaw
Chippewa Indian Tribe of Michigan*

1115 Norton Building

801 Second Avenue

Seattle, Washington 98104-1509

(206) 386-5200

26 pp

QUESTION PRESENTED

Do §§ 4, 5, and 6 of the Nelson Act contain the requisite unmistakably clear consent of Congress to permit a state to impose a property tax upon reservation land owned in fee by a sovereign tribal government?

TABLE OF CONTENTS

Page

Question Presented	i
Table of Contents	ii
Table of Citations	iii
Statement of Interest of Amicus Saginaw Chippewa Indian Tribe of Michigan	1
Summary of Argument	2
Argument	3
I. The "Unmistakably Clear Intent" Rule Derives From Fundamental Principles Of Federalism And Congress' Acknowledge-ment Of Tribal Sovereignty.	3
II. For Over Two Hundred Years, Congress Has Protected Tribes' Land Bases And Promoted Their Acquisition Of Lands.	11
Conclusion	16

TABLE OF CITATIONS

Page

Cases Cited:

<i>Alonzo v. United States</i> , 249 F.2d 189 (10th Cir. 1987)	11
<i>Bear v. United States</i> , 611 F. Supp. 589 (D. Neb. 1985), <i>aff'd</i> , 810 F.2d 153 (8th Cir. 1987)	13, 14
<i>Bryan v. Itasca County</i> , 426 U.S. 373 (1976)	5, 7
<i>California v. Cabazon Band of Indians</i> , 480 U.S. 202 (1987)	6
<i>Central Machinery Company v. Arizona State Tax Comm'n</i> , 448 U.S. 160 (1980)	7
<i>County of Oneida v. Oneida Indian Nation</i> , 470 U.S. 226 (1985)	12
<i>County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation</i> , 502 U.S. 251 (1992) ...	4, 6, 7
<i>Crow Tribe of Indians v. Montana</i> , 819 F.2d 895 (9th Cir. 1987), <i>summarily aff'd</i> , 484 U.S. 997 (1988)	5, 10
<i>Cuyuga Indian Nation of New York v. Coumo</i> , 565 F. Supp. 1297 (N.D.N.Y. 1983), <i>aff'd</i> , 528 F.2d 370 (1st Cir. 1975)	11, 12

	<i>Page</i>
<i>Federal Power Comm'n v. Tuscarora Indian Nation</i> , 362 U.S. 99 (1960)	14
<i>Goudy v. Meath</i> , 203 U.S. 146 (1906)	8
<i>Hoopa Valley Tribe v. Nevins</i> , 881 F.2d 657 (9th Cir. 1989), <i>cert. denied</i> , 494 U.S. 1055 (1990)	10
<i>Jicarilla Apache Tribe v. Board of Commr's</i> , 883 P.2d 136 (N.M. 1994), <i>adopting in relevant part but rev'g on other grounds Jicarilla Apache Tribe v. Board of Commr's</i> , 862 P.2d 428 (N.M. Ct. App. 1993)	12
<i>Joint Tribal Council of the Passamaquoddy Tribe v. Morton</i> , 388 F. Supp. 649 (D. Maine 1975)	12
<i>Leech Lake Band of Chippewa Indians v. Cass County</i> , 108 F.3d 820 (8th Cir. 1997)	1, 2
<i>McClanahan v. Arizona State Tax Comm'n</i> , 411 U.S. 164 (1973)	3, 5, 7
<i>Menominee Tribe v. United States</i> , 391 U.S. 404 (1968)	4
<i>Mescalero Apache Tribe v. Jones</i> , 411 U.S. 145 (1973)	5
<i>Moe v. Confederated Salish & Kootenai Tribes</i> , 425 U.S. 463 (1976)	5, 7

	<i>Page</i>
<i>Mohican Tribe v. Connecticut</i> , 638 F.2d 612 (2nd Cir. 1980)	11
<i>Montana v. Blackfeet Tribe of Indians</i> , 471 U.S. 759 (1985)	4, 6
<i>Oklahoma Tax Comm'n v. Chickasaw Nation</i> , 515 U.S. 450 (1995)	8
<i>Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma</i> , 498 U.S. 505 (1991)	4
<i>Oklahoma Tax Comm'n v. Sac & Fox Nation</i> , 508 U.S. 114 (1993)	5
<i>Sac & Fox Nation v. Oklahoma Tax Comm'n</i> , 967 F.2d 1425 (10th Cir. 1992), <i>vacated on other grounds</i> , 508 U.S. 114 (1993)	8
<i>Saginaw Chippewa Indian Tribe of Michigan v. United States</i> , 30 Ind. Cl. Comm. 295 (1973)	1
<i>Santa Clara Pueblo v. Martinez</i> , 436 U.S. 49 (1978)	4
<i>The Kansas Indians</i> , 72 U.S. (5 Wall) 737 (1867) ...	4
<i>The New York Indians</i> , 72 U.S. (5 Wall) 761 (1867) ..	5
<i>United States v. Candaleria</i> , 271 U.S. 432 (1926) ...	12

	<i>Page</i>
<i>United States v. Michigan</i> , 106 F.3d 130 (6th Cir. 1997), petition for cert. filed, 66 U.S.L.W. 3085 (U.S. June 30, 1997) (No. 97-14)	2, 8
<i>United States v. Sandoval</i> , 231 U.S. 28 (1913)	11
<i>United States ex rel. Santa Ana Pueblo v. University of New Mexico</i> , 731 F.2d 703 (10th Cir.), cert. denied, 469 U.S. 853 (1984)	12
<i>United States v. 7,405.3 Acres of Land</i> , 97 F.2d 417 (4th Cir. 1938)	11
<i>United States v. Wheeler</i> , 435 U.S. 313 (1978)	3
<i>Warren Trading Post v. Arizona State Tax Comm'n</i> , 380 U.S. 685 (1965)	7
<i>Washington v. Confederated Tribes of the Colville Reservation</i> , 447 U.S. 134 (1980)	7, 8
<i>White Mountain Apache Tribe v. Bracker</i> , 448 U.S. 136 (1980)	7
<i>Williams v. Lee</i> , 358 U.S. 217 (1959)	3
<i>Worcester v. Georgia</i> , 31 U.S. 515 (1832)	3
Statutes Cited:	
Act of August 24, 1935, 49 Stat. 750	15

	<i>Page</i>
Emergency Relief Appropriation Act, 49 Stat. 115 ...	15
Indian Reorganization Act (IRA), 25 U.S.C. §§ 476- 494	14
National Industrial Recovery Act, 48 Stat. 200	15
25 U.S.C. § 177	10, 11
25 U.S.C. § 407	13
25 U.S.C. § 415	13
25 U.S.C. § 459	15
25 U.S.C. § 459b	15
25 U.S.C. § 459e	15
25 U.S.C. § 461	14
25 U.S.C. § 463	14
25 U.S.C. § 463b	15
25 U.S.C. § 463d	15
25 U.S.C. § 465	14
25 U.S.C. § 477	13
25 U.S.C. § 485	15

25 U.S.C. §§ 2201 <i>et. seq.</i>	13
Idaho Code § 63-602A(1)	9
Idaho Code § 63-602AA(1)	8
Mich. Comp. Laws § 211.7	9
Mich. Comp. Laws § 211.7b	9
Mich. Comp. Laws § 211.7l	9
Mich. Comp. Laws § 211.7o	9
Mich. Comp. Laws § 211.7q	9
Mich. Comp. Laws § 211.7r	9
Mich. Comp. Laws § 211.7u	9
General Allotment Act § 6	6
Nelson Act § 4	i
Nelson Act § 5	i
Nelson Act § 6	i
United States Constitution Cited:	
U.S. Const. art. I, § 8, cl. 3	3
U.S. Const. art. VI, cl. 2	3

Other Authorities Cited:

25 C.F.R. § 152.22(b) (1995)	12
Idaho Const. art. VII, § 4	9
Montana Const. art. 8, § 5	9
Utah Const. art. 13, § 2(2)	9
Felix S. Cohen, <i>Handbook of Federal Indian Law</i> , 321 (1942 ed.)	12
Felix S. Cohen's <i>Handbook of Federal Indian Law</i> , 508 (R. Strickland ed. 1982)	12, 13, 14, 15
Cong. Rec. 11724 (Jun. 15, 1934)	14
Senate Report No. 1080, 73d Cong. 2d Sess. (May 10, 1934)	14

**STATEMENT OF INTEREST OF AMICUS SAGINAW
CHIPPEWA INDIAN TRIBE OF MICHIGAN**

Amicus Saginaw Chippewa Indian Tribe of Michigan¹ is a federally recognized Indian tribe whose reservation is located in central Michigan. The Tribe is the political successor to the Saginaw Chippewa, Swan Creek and Black River Band Indians who, through a series of treaties with the United States, relinquished over 7 million acres of land in the southern peninsula of the present-day state of Michigan. *Saginaw Chippewa Indian Tribe of Michigan v. United States*, 30 Ind. Cl. Comm. 295, 296 (1973). The Tribe's reservation was created by treaties in 1855 and 1864 from lands withdrawn for the Tribe by Executive Order in 1855. Much of the reservation land was allotted according to an allotment plan contained in the 1864 treaty, which predates the General Allotment Act by over twenty years.

Like many federally recognized Indian tribes throughout the United States, the Leech Lake Band of Chippewa Indians and the Saginaw Chippewa Tribe are struggling to reacquire lands within their reservations that were removed from tribal ownership. This case arose from the efforts of Cass County, Minnesota, to ignore the Leech Lake Band's sovereign and governmental status and tax the Band as it would any other individual landowner, thereby frustrating the Band's efforts to rebuild its land base, impinging on the Band's status as an independent sovereign entity, and undermining the Federal Government's history of tribal governmental recognition and protection. *See Leech Lake Band*

1. The parties have consented to the filing of this brief.

No counsel for a party in this case authored this brief, either in whole or in part. No person or entity other than amicus Saginaw Chippewa Indian Tribe of Michigan, its members, or its counsel made a monetary contribution to the preparation and submission of this brief. *See Supreme Court Rule 37.6.*

of *Chippewa Indians v. Cass County*, 108 F.3d 820 (8th Cir. 1997). The ruling, which is the subject of this petition, concluded that Cass County may not assert taxing authority over the Band and its property absent the clear consent of Congress to do so.

This ruling is consistent with the ruling of the Sixth Circuit Court of Appeals in *United States v. Michigan*, 106 F.3d 130 (6th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3085 (U.S. June 30, 1997) (No. 97-14). The Saginaw Chippewa Tribe is a party to *United States v. Michigan*, and the Court's decision here will directly affect the outcome of *United States v. Michigan* and the interests of the Tribe. For the reasons discussed by respondent Leech Lake Band and amici in support, the Saginaw Chippewa Tribe of Michigan respectfully urges affirmance of *Leech Lake Band of Chippewa Indians v. Cass County*, 108 F.3d 820 (8th Cir. 1997).

SUMMARY OF ARGUMENT

The Eighth Circuit Court of Appeals' application of the well established "unmistakably clear intent" rule is consistent with this Court's jurisprudence concerning the constitutional bars to states' power to tax sovereign tribal governments within their reservations. Because the Constitution gives the Federal Government exclusive authority over Indian affairs, this bar can be overcome only by a clear expression of unmistakable congressional intent to allow a state to exercise such authority. This rule is premised upon essential rules governing federal-state relations and the Federal Government's commitment to protect tribal sovereignty, all of which are implicated when such consent is granted. To find the requisite congressional consent in anything other than a clear expression impairs the ability of sovereign Indian tribes to become self-governing and self-sufficient through reacquisition of lands within their reservations and threatens their ability to retain those lands once reacquired.

ARGUMENT

I. THE "UNMISTAKABLY CLEAR INTENT" RULE DERIVES FROM FUNDAMENTAL PRINCIPLES OF FEDERALISM AND CONGRESS' ACKNOWLEDGEMENT OF TRIBAL SOVEREIGNTY.

Before the coming of the Europeans, Indian tribes were self-governing sovereign political communities. *United States v. Wheeler*, 435 U.S. 313, 322-33 (1978); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973). For over 200 years, the United States in general and Congress in particular have recognized the inherent sovereignty of Indian tribes.

The Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, and the power of Congress under the Constitution to conclude treaties with Indian tribes provide Congress with "all that is required" for complete control over Indian affairs. *Worcester v. Georgia*, 31 U.S. 515, 559 (1832). The Supremacy Clause mandates that treaties and federal constitutional authority over Indian affairs shall control over state actions affecting Indian affairs. U.S. Const. art. VI, cl. 2. These provisions both expand federal power and contract state power resulting in a broad grant of authority of the Federal Government over Indian affairs. Congress retains exclusive authority over Indian affairs and jealously guards its authority from intrusion by the states. *See, e.g., Williams v. Lee*, 358 U.S. 217 (1959); *McClanahan*, 411 U.S. at 165 ("the state has interfered with matters which the relevant treaty and statutes leave to the exclusive province of the Federal Government and the Indians themselves.").

Congress remains firm in its recognition of tribal sovereignty and of the powers and rights held by tribal sovereigns. Thus, although tribal sovereignty may have some limitations imposed by Congress, Indian tribes remain "domestic dependent nations"

that exercise inherent sovereign authority over their members and their territory. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991).

In those instances where Congress limits tribal sovereign powers or allows state incursion into tribal matters, it does so only by clear, express, and unequivocal language. *E.g.*, *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 258 (1992) (absent cession of jurisdiction or other federal statute permitting it, states are without power to tax reservation lands and Indians within Indian country absent unmistakably clear congressional intent); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (waivers of tribal sovereign immunity by Congress must be clearly expressed); *Menominee Tribe v. United States*, 391 U.S. 404, 411-413 (1968) (termination act requires explicit statement abrogating treaty hunting and fishing rights, and such intention would not be lightly imputed to the Congress).

Tribal sovereignty coupled with the exclusive authority of the United States over the affairs of Indians creates a near absolute bar to state tax authority over Indians within Indian country:

The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes. As a corollary of this authority, and in recognition of the sovereignty retained by Indian tribes even after formation of the United States, Indian tribes and individuals generally are exempt from state taxation within their own territory.

Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 764 (1985) (citations omitted).² The Federal Government's

2. See also *The Kansas Indians*, 72 U.S. (5 Wall) 737 (1867) (state
(Cont'd)

protection of Indian tribes and recognition of their sovereignty underpins this reversal of the usual rule applicable to tax exemptions. *E.g.*, *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 124 (1993) ("the tradition of Indian sovereignty requires that the rule be reversed when a State attempts to assert tax jurisdiction over an Indian tribe"); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973) (concluding state assertion of taxing jurisdiction over tribes and Indians within Indian country is distinguishable from other assertions of state jurisdiction).

Accordingly, this Court adheres to a categorical presumption against state authority to tax Indians within Indian country:

In keeping with its plenary authority over Indian affairs, Congress can authorize the imposition of state taxes on Indian tribes and individual Indians. It has not done so often, and the Court consistently has held that it will find the Indians' exemption from state taxes *lifted only when Congress has made its intention to do so unmistakably clear*.

(Cont'd)

did not have authority to impose a tax on lands within the Shawnee Indian Reservation); *The New York Indians*, 72 U.S. (5 Wall) 761, 771 (1867) (state's attempt to tax Indian reservation land was "extraordinary," and "illegal" exercise of state power and "unwarrantable interference, inconsistent with the original title of the Indians, and offensive to their tribal relations."); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973) (state cannot tax personal income earned by an Indian from employment on a reservation); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 463 (1976) (state cannot impose personal property taxes upon motor vehicles or motorhomes owned by reservation Indians); *Bryan v. Itasca County*, 426 U.S. 373 (1976); *Crow Tribe of Indians v. Montana*, 819 F.2d 895, 903 (9th Cir. 1987) (state cannot impose severance tax on coal owned by tribe), *summarily aff'd*, 484 U.S. 997 (1988)).

Montana v. Blackfeet Tribe, 471 U.S. 759, 765 (1985) (emphasis added). See also *California v. Cabazon Band of Indians*, 480 U.S. 202, 215 n.17 (1987) (characterizing *Montana* holding as a "per se rule.").

In accordance with the foregoing principles, the *Yakima Nation* analysis begins with a statement of the "unmistakably clear intent" rule:

[W]e have traditionally followed "a per se rule" "[i]n the special area of state taxation of Indian tribes. . . ." "Either Congress intended to pre-empt the state taxing authority or it did not. Balancing of interests is not the appropriate gauge for determining validity [of state taxation] since it is that very balancing which we have reserved to Congress."

Yakima Nation, 502 U.S. at 267 (quotations and citations omitted). The *Yakima Nation* decision thus hinges on the clearly manifested intention of Congress to permit the state tax, which the Court found in § 6 of the General Allotment Act. *Yakima Nation*, 502 U.S. at 259 n.1.

The *Yakima Nation* holding is much more than the simplistic conclusion that alienability equals taxability. It is the product of the convergence of the "unmistakably clear intent" rule and indicia of Congress' rescission of the special relationship of the Federal Government to Indian allottees under the General Allotment Act: Congress' grant of state personal criminal and civil jurisdiction over allottees upon issuance of a fee patent and Congress' express grant of taxation authority under the Burke proviso amending the General Allotment Act. These indicia led the *Yakima Nation* Court to hold that, under those particular circumstances, land under the General Allotment Act was subject to the state's real property tax. Those specific indicia in the General Allotment Act and Burke Act

proviso do not control the question of taxation of lands removed from Indian ownership under other statutory or treaty provisions.

Modern Supreme Court decisions that prohibit state taxation of Indian property within Indian country do so in the context of property that was fully alienable.³ *Yakima Nation* is properly viewed as an application of the "unmistakably clear intent" rule and a logical extension of this line of cases and does not rest on alienability.⁴ This reading of *Yakima Nation* is confirmed by the

3. E.g., *Bryan v. Itasca County*, 426 U.S. 373 (1976) (prohibiting state taxation of a mobile home and other personal property owned by an Indian and located within Indian country, even though Congress had granted civil jurisdiction to the state over Indians in Indian country through Public Law 280); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973) (prohibiting state taxation of income earned by a tribal member residing within Indian country); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976) (prohibiting state taxation of motor vehicles owned by Indians residing within Indian country); *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980) (prohibiting state taxation of the sale of tobacco products to Indians within Indian country).

4. Indeed, the Supreme Court has prohibited state taxation of non-Indian property and transactions within Indian country, even though the property involved in such transactions was fully alienable. E.g., *Central Machinery Company v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980) (sale of non-Indian personal property to tribe exempt from state transaction privilege tax); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) (non-Indian enterprise doing business on the reservation exempt from state motor carrier license tax and fuel tax); *Warren Trading Post v. Arizona State Tax Comm'n*, 380 U.S. 685 (1965) (store owned by non-Indian and located on reservation exempt from state gross receipts tax). These decisions rely on principles of federal preemption that evince the intent of Congress to prohibit state economic and legal intrusions into reservation affairs involving Indians. In none of these cases was alienability a factor in the decision. In every case, the location of the property or transaction on an Indian reservation and the incidence of the tax falling on an Indian or Indian tribe controlled the outcome.

subsequent decision in *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995) (rejecting state motor fuel tax upon Indians and Indian tribes within Indian country).

Because of the operation of the Supremacy Clause and the federal trust responsibility, a state may not "tax indirectly what it cannot tax directly." *Sac & Fox Nation v. Oklahoma Tax Comm'n*, 967 F.2d 1425, 1430 (10th Cir. 1992), *vacated on other grounds*, 508 U.S. 114 (1993). It is one thing to infer congressional consent to state taxation of individual Indians who have abandoned their tribal relations, e.g., *Goudy v. Meath*, 203 U.S. 146 (1906) (holding taxable land owned by individual who had abandoned tribal relations); it is quite another to infer that consent to allow taxation of the sovereign tribal government itself.

States may not unilaterally overcome the constitutional bar to their exercise of power over sovereign Indian tribes by recharacterizing a tax as falling on the land, rather than the landowner. A state's characterization of its tax is of little relevance in determining whether the state may overcome the Supremacy and Indian Commerce Clauses and other federal law and assert its taxing authority over a sovereign Indian tribal government operating within its reservation. E.g., *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. at 163 ("While [the state] may well be free to levy a tax on the use outside the reservation of Indian-owned [personal property], it may not under that rubric accomplish what *Moe* held was prohibited."); *see also United States v. Michigan*, 106 F.3d 130 (6th Cir. 1997).

Many state property tax schemes have some direct operation upon the landowner — in this case a sovereign tribal government. In recognition of the reality that it is the landowner who pays the taxes, states have long exempted property from taxation according on the status of the landowner,⁵ particularly when the owner is a

5. E.g., Idaho Code § 63-602AA(1) ("The following property is
(Cont'd)

governmental entity.⁶ Indeed, in many states the exemption of property from taxation based upon the landowner's status is constitutionalized.⁷

As owners of fee land, sovereign tribal governments must ultimately pay the taxes — either by a cash payment from their

(Cont'd)

exempt or partially exempt from taxation: real and personal property belonging to persons who, because of unusual circumstances which affect their ability to pay the property tax, should be relieved from paying all or part of said tax in order to avoid undue hardship, which undue hardship must be determined by the board of equalization."); Mich. Comp. Laws § 211.7b (homestead of disabled soldier or a sailor or a surviving spouse exempt from real estate tax); *id.* § 211.7o (property of nonprofit charitable institutions exempt from real estate tax); *id.* § 211.7q (property owned by youth organizations exempt from real estate tax); *id.* § 211.7r; *id.* § 211.7u (property of persons in condition of poverty exempt from real estate tax).

6. E.g., Idaho Code § 63-602A(1) ("The following property is exempt from taxation: property of the United States, except when taxation thereof is authorized by the congress of the United States, this state, or to any county or municipal corporation or school district within this state."); Mich. Comp. Laws § 211.7 (federal property exempt from real property tax); *id.* § 211.7l (state public property exempt from real property tax). *See also* footnote 7 *infra*.

7. E.g., Idaho Const. art. VII, § 4 ("the property of the United States . . . the state, counties, towns, cities, villages, school districts, and other municipal corporations and public libraries shall be exempt from taxation"); Montana Const. art. 8, § 5 (allowing tax exemptions for property "of the United States, the state, counties, cities, towns, school districts, municipal corporations, and public libraries. . ."); Utah Const. art. 13, § 2(2) (establishing tax exemptions for property owned by the state, school district, public libraries, certain nonprofit entities, and disabled persons disabled in the line of duty during any war, international conflict or military training in the military service of the United States or state of Utah).

sovereign coffers or by forfeiture of their land at sale. If the state real property taxes are enforceable against the sovereign tribal governments, only one of two proscribed results will obtain.

The first result is that a state government will be allowed to invade the treasury of a sovereign Indian tribe in the amount of the tax. See *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657 (9th Cir. 1989) (holding unlawful state timber yield tax passed on to non-Indian purchasers of tribal timber), *cert. denied*, 494 U.S. 1055 (1990); *Crow Tribe of Indians v. Montana*, 819 F.2d 895 (9th Cir. 1987), *aff'd*, 484 U.S. 997 (1988) (holding unlawful state coal severance tax because the taxes ultimately reduced the royalty received by the tribe). The second but equally forbidden result is that the tribal property will be sold at a state tax sale. See 25 U.S.C. § 177. The first result diminishes the tribal fisc; the second diminishes the tribal land base. Both results are preempted by the Federal Government's exclusive authority over Indian tribes and damage tribal sovereignty, self-determination and self-sufficiency.

More directly, however, both results frustrate the long-established policies of both the Federal Government and Indian tribal governments to restore to tribal ownership some measure of the reservation land base removed from tribal ownership. Correct application of the "unmistakably clear intent" rule in cases where state governments attempt to tax the property of a tribal government affect more than recognition of the correct rules governing federal-tribal relations. Other positive laws, which codify the Federal Government's policy of conserving and expanding the land base of Indian tribes, require continued correct application of the "unmistakably clear intent" rule.

II. FOR OVER TWO HUNDRED YEARS, CONGRESS HAS PROTECTED 'TRIBES' LAND BASES AND PROMOTED THEIR ACQUISITION OF LANDS.

One express codification of the Congress' intention to protect the existing tribal land base from further erosion is the Indian Non-Intercourse Act, Act of June 30, 1834, ch. 161, § 12, 4 Stat. 730 (codified in present form at 25 U.S.C. § 177).⁸ By its express terms, the Non-Intercourse Act continues to place a restraint on alienation of all tribal lands — whether held in fee or trust status.⁹

8. Section 177 states in relevant part:

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

25 U.S.C. § 177. In its brief on the merits, respondent Leech Lake Band details the 200-year history of the Non-Intercourse Act.

9. E.g., *United States v. Sandoval*, 231 U.S. 28, 47-48 (1913) (holding that fee status of the Pueblos' land was not an impediment to Congress' constitutional power to apply liquor prohibition to such lands); *Alonzo v. United States*, 249 F.2d 189, 195-96 (10th Cir. 1987) (concluding that the word "lands" in the text of § 177 "is in nowise limited by any express or implied language in the Act," and that the "reason for the imposition of the restrictions is in nowise related to the manner in which the Indians acquire their lands."); *Mohican Tribe v. Connecticut*, 638 F.2d 612, 621 (2nd Cir. 1980) ("the Non-Intercourse Act, containing no language of limitation, must then be read as applying to all Indian lands"); *United States v. 7,405.3 Acres of Land*, 97 F.2d 417 (4th Cir. 1938) (lands purchased by tribe fall within the protection of the federal government and the restrictions upon alienation); *Cuyuga Indian Nation of New York v. Coumo*, 565 F. Supp. 1297, 1313 (N.D.N.Y. 1983) ("the language of the 1793 and 1802 Non-Intercourse Acts

(Cont'd)

The Non-Intercourse Act confirms that the insulation of tribal lands from state control remains one of the cornerstones of federal Indian policy. *E.g.*, *County of Oneida*, 470 U.S. 226 (1985).

The overriding present-day policy behind § 177 is to protect the tribal land base. *United States ex rel. Santa Ana Pueblo v. University of New Mexico*, 731 F.2d 703 (10th Cir.), *cert. denied*, 469 U.S. 853 (1984); *see also Felix S. Cohen's Handbook of Federal Indian Law*, 508-509 (R. Strickland ed. 1982) ("1982 Handbook"). By requiring federal approval of any sale of tribal lands, § 177 codifies Congress' continued protective policy towards those lands. As one court explains:

The federal government, acting through Congress

(Cont'd)
reveals no ambiguity whatsoever as to their geographic scope"), *aff'd*, 528 F.2d 370 (1st Cir. 1975); *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 388 F. Supp. 649, 660 (D. Maine 1975) ("the Court holds that the Non-Intercourse Act is to be construed as its plain meaning dictates and applies to the Passamaquoddy Indian Tribe"); 25 C.F.R. § 152.22(b) (1995). *See also Felix S. Cohen, Handbook of Federal Indian Law*, 321 (1942 ed.) ("[A] tribe holding land in fee simple is subject to exactly the same restraints upon alienation as any other tribe"; citing *United States v. Candleria*, 271 U.S. 432 (1926)); 1982 *Handbook*, at 480 n.73 ("The precise title granted to the tribe makes little difference since, absent contrary congressional action, the restrictions on alienation and other unique attributes of Indian trust land apply equally to lands held in trust for the tribes by the United States and to lands held in fee title by tribes with which the federal government maintains a trust relationship"). *See generally County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985); *Jicarilla Apache Tribe v. Board of Commr's*, 883 P.2d 136, 140 (N.M. 1994) (stating "[w]e also that the [land held in fee by the tribe] became subject to a restriction against alienation imposed by the United States when it was purchased by the Tribe."), *adopting in relevant part but rev'g on other grounds Jicarilla Apache Tribe v. Board of Commr's*, 862 P.2d 428 (N.M. Ct. App. 1993).

and the Department of the Interior, has often established nation-wide policies for the retention or disbursement of Indian lands. . . . The Non-Intercourse Act's government approval requirements serves [sic] both to preserve the trust relationship between the government and the Tribe and to insure that management of Indian lands be in keeping with nation-wide policies established by the federal government.

Bear v. United States, 611 F. Supp. 589, 597 (D. Neb. 1985) (citations omitted), *aff'd*, 810 F.2d 153 (8th Cir. 1987).

Congress occasionally invokes its ability to override by statute § 177's umbrella restriction on alienability of tribal lands, thereby recognizing § 177's continuing viability. *E.g.*, Indian Land Consolidation Act of 1983, 25 U.S.C. §§ 2201 *et. seq.* (allowing tribes to exchange lands under a consolidation plan); 25 U.S.C. § 407 (allowing tribes to sell standing timber from their lands); *id.* § 415 (allowing tribes to lease their lands); *id.* § 477 (allowing tribes chartered as corporations to buy and sell land); *see also 1982 Handbook* at 517 n.56.¹⁰

Congress rarely lifts § 177's restriction allowing Indian land to be alienated involuntarily. Indeed, only in the case of

10. These statutes indicate three things. Primarily, as noted above, Congress continues to recognize the effect of § 177 in the modern era and passes statutes to expressly overcome the restriction only for specific purposes. Second, these statutes refute any notion that § 177 prohibits every encumbrance or alienation of tribal lands and thus is unduly restrictive. Third, these statutes exemplify Congress' broad authority over Indian property and its ability to modify or enhance the existing statutory framework in the interest of carrying out the Federal Government's policy of protecting tribal interests and property from incursion by states and third parties.

condemnation has Congress allowed involuntary alienation of tribal lands. *E.g.*, *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99 (1960) (off-reservation fee lands); *Bear v. United States*, 611 F. Supp. 589 (D. Neb. 1985) (treaty lands). The Constitution mandates that in federal condemnation actions fair market value be paid for the land and that the land be used for a public purpose. An involuntary sale under a state property tax scheme accomplishes the very thing § 177 is designed prevent: the involuntary loss of tribal lands into private ownership. *See 1982 Handbook* at 520.

A second statutory expression of the Federal Government's policy of conserving and enhancing the tribal land base is contained in the Indian Reorganization Act, 25 U.S.C. §§ 476-494 (IRA). The IRA was intended to stop the alienation of tribal land needed to support Indians and to provide for acquisition of additional land for tribes. *1982 Handbook* at 147; *see also* Senate Report No. 1080, 73d Cong. 2d Sess. at 1 (May 10, 1934); Cong. Rec. 11724, 11730 (Jun. 15, 1934) (floor remarks of Sen. Howard) ("In order to protect the economic future of the Indians and to protect the Government itself against the loss and disintegration of the Indian property, it is most essential to prevent alienation of Indian lands outside of Indian ownership.").

The IRA specifically halts the allotment process. 25 U.S.C. § 461. In addition, Congress authorizes the Secretary of the Interior to "restore to tribal ownership the remaining surplus lands of any reservation heretofore opened. . . ." 25 U.S.C. § 463.

Section 5 of the IRA, 25 U.S.C. § 465, the purpose of which is also to "provid[e] land for Indians," allows exchange transactions in which an individual Indian transfers allotted land to the tribe in exchange for an assignment of occupancy rights in the same or another tract. Congress intended section 5 "to increase the tribal estate rather than to open the way to its alienation." *1982 Handbook*

at 483 (citation omitted). The IRA provides other methods for conserving and expanding tribes' land base to enhance tribes' exercise self-government and to become assist them in becoming self-sufficient. *See generally 1982 Handbook* at 148-49.

Other federal statutes enacted after the IRA continue the federal policy of restoration of tribal land. Such statutes may authorize the use of tribal funds to purchase individually owned lands within Indian reservations. *1982 Handbook* at 479 nn.64-65. From time to time Congress acts to purchase, exchange or otherwise increase the land base of particular tribes. *E.g.*, 25 U.S.C. § 463b (authorizing purchase of lands for Papago Indians), § 463d (authorizing purchase of lands for Umatilla Reservation).

Congress has also authorized the Secretary of Agriculture to make loans to Indian tribes or tribal corporations established under § 17 of the IRA that do not have adequate funds to purchase lands for use of the tribe, or the corporation, or members of either. 25 U.S.C. § 485.

Congress has also increased the tribal land base by declaring to be held in trust for various Indian tribes "all right, title and interest of the United States of America in all of the land" acquired under the National Industrial Recovery Act, 48 Stat. 200, the Emergency Relief Appropriation Act, 49 Stat. 115, and § 55 of the Act of August 24, 1935, 49 Stat. 750, 781; 25 U.S.C. § 459; *see also* 25 U.S.C. § 459b (similar interests to be held for the Stockbridge Munsee Indian Community). Congress confirmed the exemption of these interests in land from federal, state and local taxation. 25 U.S.C. § 459e.

These statutes are examples of the direct expressions of the Federal Government's continuing dedication to restoring to Indian tribes a land base sufficient for them to become self-sufficient and self-governing. Allowing tribally owned lands to be involuntarily

burdened or alienated through operation of state property tax schemes is contrary to Congress' express statutory objectives to conserve and reestablish the land base of sovereign Indian tribes.

CONCLUSION

For the foregoing reasons, amicus Saginaw Chippewa Indian Tribe of Michigan respectfully requests that this Court affirm the decision in *Leech Lake Band of Chippewa Indians v. Cass County*, 108 F.3d 820 (8th Cir. 1997).

Respectfully submitted,

FRANK R. JOZWIAK

Counsel of Record

K. ALLISON MCGAW

MORISSET, SCHLOSSER, AYER
& JOZWIAK

*Attorneys for Amicus Curiae Saginaw
Chippewa Indian Tribe of Michigan*

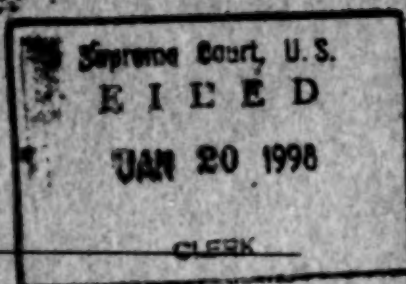
1115 Norton Building

801 Second Avenue

Seattle, Washington 98104-1509

(206) 386-5200

(19)
No. 97-174



**In the
Supreme Court of the United States
October Term, 1997**

CASS COUNTY, MINNESOTA, et al,
Petitioners,
v.
LEECH LAKE BAND OF CHIPPEWA INDIANS,
Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Eighth Circuit

**BRIEF OF AMICI CURIAE TRIBES OF
FOREST COUNTY POTAWATOMI
COMMUNITY, EASTERN BAND OF CHEROKEES, and
TURTLE MOUNTAIN BAND OF
CHIPPEWA INDIANS
IN SUPPORT OF RESPONDENTS**

CAROL BROWN BIERMEIER
Counsel of Record
Brown & LaCounte, LLP
2916 MarketPlace Drive
Suite 104
Madison, WI 53719
Attorneys for Amici Curiae

BEST AVAILABLE COPY

35 pp

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
TABLE OF AUTHORITIES.....	iii
INTEREST OF THE AMICI CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT:	
I. THE LEECH LAKE BAND OF CHIPPEWAS HAS NOT RELINQUISHED IN ANY TREATY ITS INHERENT SOVEREIGN POWER TO REACQUIRE AND RETURN LAND WITHIN ITS TERRITORY TO ITS PUBLIC DOMAIN.....	6
II. THE EXERCISE BY TRIBES OF THE POWER TO ACQUIRE PRIVATE PROPERTY AND RETURN IT TO THE TRIBE'S PUBLIC DOMAIN IS NOT INCONSISTENT WITH THEIR STATUS	7
a. Lands Acquired by the Tribe Pursuant to Section 465 of the IRA are exempt from State and Local Taxation	9

QUESTION PRESENTED

AMICI CURIAE TRIBES WOULD STATE THE ISSUE AS FOLLOWS:

WHETHER INDIVIDUAL PARCELS OF PROPERTY, OVER WHICH A TRIBE EXERCISES TERRITORIAL DOMINION, CAN BE SUBJECTED TO THE TAXING JURISDICTION OF THE STATE ABSENT A CLEAR ABROGATION BY CONGRESS, OR A CESSION BY THE TRIBE, OF ITS SOVEREIGNTY.

III.	CONGRESS HAS NEVER ABROGATED THE INHERENT POWERS OF THE TRIBE TO REACQUIRE PRIVATE PROPERTY AND RETURN IT TO THE TRIBE'S PUBLIC DOMAIN	10
a.	The General Allotment Act of 1887 Did Not on its Face Authorize State Taxation of Allotments	11
IV.	THE GENERAL ALLOTMENT ACT AND SUBSEQUENT LEGISLATION HAS NOT WAIVED TRIBES' COMMON LAW IMMUNITY FROM SUIT	13
V.	CO-EXISTENT STATUTES MUST BE INTERPRETED IN LIGHT OF INTERVENING LEGISLATIVE ENACTMENTS	20
a.	The <i>Yakima</i> Court misapplied the "per se" rule regarding State taxation in Indian Country and therefore must be overturned.....	20
b.	Federal Preemption is the Correct Standard to apply to the Question of Whether States Have the Taxation Authority over Indian Tribes and Their Members	21
	CONCLUSION	25

TABLE OF AUTHORITIES

Cases	Page
Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989)	4, 8, 16, 18-20, 23, 26
Buster v. Wright, 135 F. 947 (CA8 (1905)) ..	15
California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987)	12-13
Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 176 (1989)	23
County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251 (1992)	20
English v. General Electric Co., 496 U.S. 72 (1990)	24
Felder v. Casey, 487 U.S. 131, 138 (1988) ...	21
Goudy v. Meath, 201 U.S. 146 (1906) ..	6, 11-12
Hagen v. Utah, 510 U.S. 399 (1994)	17

In re Heff, 197 U.S. 488 (1905)	11
Hines v. Davidowitz, 312 U.S. 52 (1941)	22, 24
Iselin v. United States, 270 U.S. 245, 250-251 (1926)	23
Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823)	4-6
Lonewolf v. Hitchcock, 187 U.S. 553 (1903)	10
Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973)	9-11
Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148 (1982)	14
National Farmers Union v. Crow Tribe, 471 U.S. 845 (1985)	4
Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 510 (1991)	13
Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)	5, 8
Perez v. Campbell, 402 U.S. 637 (1971)	22
Pimalco, Inc. v. Maricopa County, 937 P.2d 1198, 203 (1997)	16

Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico, 458 U.S. 832, 838 (1982)	24
Rice v. Rehner, 463 U.S. 713, 719 (1983)	24
Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)	4, 13
Solem v. Bartlett, 465 U.S. 463 (1984)	17
Talton v. Mayes, 163 U.S. 376 (1896)	4
United States v. Celestine, 215 U.S. 278, 285 (1909)	17
United States v. Mazurie, 419 U.S. 544 (1975)	5, 15, 17
United States v. Winans, 198 U.S. 371, 381 (1905)	4
Washington v. Confederated Tribes of the Colville Indian Res., 447 U.S. 34, 154 (1980)	23
West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83 (1991)	22-25
Worcester v. Georgia, 31 U.S. at 582	6

Statutes

8 U.S.C. § 1401(b)	8
25 U.S.C. §450 et. seq.	14
25 U.S.C. §461-479 (1988)	9, 20
25 U.S.C. §1153	12
25 U.S.C. §§1301-1303	7, 15
25 U.S.C. §1451 et. seq.	14
25 U.S.C. §§1901-1963 (1988)	21
25 U.S.C. §§2201-2211 (1988)	22
25 U.S.C. §§2701-2721 (1988)	21
25 U.S.C. §§2901-2906 (Supp. II 1990)	22
25 U.S.C. 3701-3745 (1994)	21

24 Stat. 388 (1887)	20
24 Stat. 390, Yakima, at 689-93	20
96 Stat. 2607 (codified in scattered sections of 26 U.S.C.) Pub. L. No. 97-473	21

Other Authorities

7 Op. Att'y. Gen. 174 (1855)	14
17 Op. Att'y. Gen. 134 (1881)	14
23 Op. Att'y. Gen. 214 (1900)	14
55 (Katherine Woods trans., (1943)	3
Cohen's Handbook of Federal Indian Law, 147 (Rennard Strickland et al. eds., 1982)	25
"The Forgotten American:" The President's Message to the Congress on Goals and Programs for the American Indians, PUB. PAPERS 335 (1968-69)	25
.....	
H.R. Rep. No. 1804, 73d Cong., 2d Sess., 6	

(1934)	10
Indian Land Consolidation Act, 25 U.S.C.	
§§ 2201-2211	7, 18
Institute for Gov't Research, The Problem of	
Indian Administration 3-51 (1928)	23
IRA (sec 17, sec 477)	18
Linde, First Things First: Rediscovering the States'	
Bills of Rights, 9 U. Balt. L. Rev. 370, 380	
(1980)	3
Memorandum of Law by Solicitor of the U.S.	
Department of the Interior, John D. Leshy, dated	
March 30, 1995.	11
Powers of Indian Tribes, 55 I.D. 14, 46	
(1934)	14
Prucha, Francis P., The Great Father, (abridged	
ed. 1986)	25
Special Message to the Congress on Indian Affairs,	
PUB. PAPERS 564 (1970)	25
Wheeler-Howard Act, H.R. 7902 and S. 2755,	
Tit. I, s 11.Id. at 5.)	10

INTEREST OF THE AMICI CURIAE¹

This case presents the question of whether the States and their political subdivisions may impose *ad valorem* taxes on fee patented lands located within the territory of an Indian Tribe irrespective of whether those lands are acquired and subsequently regulated by the governing Indian Tribe or owned individually by its members.

While the issues in this case involve lands within a Tribe's territorial boundaries in the State of Minnesota, the decision of this Court will have far reaching impacts on almost every Indian Tribe in the United States. The policy of allotment has had continuing adverse effects on the sovereignty of Tribes since its first legislative enactment notwithstanding the policy's repudiation by subsequent legislation. The resultant effects place Tribes in an increasingly precarious position exposing its future as a sovereign government to uncertain and significant risk. Because sovereignty is inextricably tied to territory, this vulnerability of such sovereignty through land foreclosure actions on certain parcels by States and their political subdivisions results in the systematic erosion of what remains of tribal sovereignty, an impact clearly unintended by Congress as evidenced by its intervening legislation since the Dawes Allotment Act.

More particularly, each of the Tribes represented in this brief will be directly affected by the decision of the Court in this case due to either the present existence of a scattering of fee-patented lands located within their Reservation boundaries or the recent acquisition

¹The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

of lands immediately adjacent to, or located within, their present land base. This impact will be measured not only in terms of the future status of their land holdings. Rather, and more significantly, the consequences will impact the effectiveness on Tribes' ability to exercise complete dominion over their own territory pursuant to their own Constitutions and pursuant to post-allotment legislation which reflects the federal government's Indian policy of self-determination, sovereignty, and control over Indian country.

The reduction in the local tax base is of minimal consequence when measured against the broader, more far-reaching effects suffered by Tribe governments as a result of the ability of States to further dismantle their land base through taxation. Moreover, requiring Tribes to pay, through ad valorem taxes, for local services, typically not always commensurate with the taxes paid as evidenced by the expansion of Tribal services, places Tribes in a "catch-22" situation. One of the essential tools to self-government, the power of taxation, will be judicially foreclosed in the face of existing federal statutes encouraging Tribes' efforts to sustain their sovereignty and vitality.

Whenever a government decides to exercise its taxation authority, it must be able to do so without excessive interference from other governments. If another governmental entity can defeat its taxing power on illogical and unprecedented legal grounds, the Tribes' taxation power is rendered useless. Thus, contrary to the *Yakima* Court's opinion that the mere power to assess and collect a tax on real estate is not disruptive of tribal self-government, in actuality, Tribes, at the very least, will lose much needed income from revenue-raising tools normally relied upon by other governments to maintain their sovereignty, which will result in a systematic collapse of their government and vitality. Their cultural patrimony will be lost. Their democratic political processes and relationships regarding their own citizens and their governments will go unexercised. Economic development will be stifled. From

intestate death to intestate death, child by child, acre by acre, blood degree by blood degree, by furthering the legacy of allotment, the current Indian law jurisprudence will ensure that Tribes, their members, and their sovereignty spiral toward a slow but certain demise.

SUMMARY OF ARGUMENT

"You own the stars?"

"Yes."

"But I have seen a King who"

"Kings do not own, they reign over; it is a very different matter."

Antoine de Saint Exupery, *The Little Prince*, 55 (Katherine Woods trans., 1943).

The Tenth Amendment to the United States Constitution represents the guiding principles and logic of the American federalist system. That provision declares that the States and their citizens are the source of the Union's powers, granting certain powers to the Union and reserving all inherent, residual powers. The Tenth Amendment's logic is based upon two tenets of American federalism. First, the original thirteen States pre-existed the Union and, second, republican democracy requires that the power to govern derives from people. Invoking both tenets of American federalism, one American jurist wrote: "State bills of rights are first in two senses: first in time and first in logic."²

The Supreme Court has explained that the United States of America recognizes the inherent sovereignty of the Tribes for the same two reasons. First, Tribes pre-existed the United States and the original thirteen States and thus they derive their sovereignty from

² Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. Balt. L. Rev. 370, 380 (1980).

outside the U.S. political sphere. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). Second, the United States invokes American notions of republican democracy, that Tribes derive their sovereignty from the governed within a politically recognized territory. *Talton v. Mayes*, 163 U.S. 376 (1896) *National Farmer's Union v. Crow Tribe*, 471 U.S. 845 (1985) *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, et al.*, 492 U.S. 408 (1989). In this regard, the foundational relationship between the Tribes and the United States is similar to the foundational relationship between the States and the Union.

The States formed their relationship with the Union and each other through the Constitution, while the Tribes generally formed their relationship with the Union and the States through treaties. Nevertheless, in language remarkably similar to the Tenth Amendment the Supreme Court has imputed its wording and logic into the treaty-based relationship between the U.S. and the Tribes. The Court wrote "In other words, the treaty was not a grant of rights to the Indians, but a grant rights from them -- a reservation of those not granted." *United States v. Winans*, 198 U.S. 371, 381 (1905). In other words, the Tribes pre-existed the Union and the States and, in light of republican democracy, represented the source of America's powers over the Tribes and the reservoir of the Tribes' inherent powers not granted to the United States in treaties.

Therefore, Tribes originally possessed full sovereignty to govern their territory, including holding land communally as public domain or establishing and regulating a system of private property. In *Johnson v. M'Intosh*, 21 U.S. (8 Wheat) 543 (1823) the Chief Justice wrote, "The person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws." *Id.* at 593. This statement in *Johnson* recognizes that Tribes inherently possessed the inherent sovereign power to govern territory, maintain a public domain, issue

title, regulate that title, and rescind that title. *Id.*³

However, Court opinions have declared with increasing frequency that Tribes are no longer possessed of the full sovereignty that they once maintained. According to Court opinions, Tribes possess inherent sovereignty that has not been voluntarily relinquished in treaties or agreements,⁴ abrogated by Congress⁵, or deemed inconsistent with their status.⁶ *Oliphant v. Suquamish Indian Tribe, et al.*, 435 U.S. 191 (1978). As an added measure of Tribes' governance, Congress may delegate certain governmental powers to Tribes. *U.S. v. Mazurie*, 419 U.S. 544 (1975). Therefore, the inquiry should be: 1) whether, in treaties, the Leech Lake Band of Chippewa has relinquished its inherent sovereign power to reacquire and return property within its territory to its public domain; 2) whether Congress has ever abrogated such powers; 3) whether the exercise of such powers by Tribes is inconsistent with their status; or 4) whether Congress has ever delegated that authority to Tribes. The answer is, indisputably and undeniably, that 1) Tribes have never relinquished such inherent sovereign authority under their Treaties; 2) Congress has never abrogated that authority; 3) the exercise of such powers are completely consistent with the Tribes' status; and 4) such delegation is unnecessary because Tribes still possess such

Johnson's holding was that "the courts of this country" could not sustain such a title granted by an unrecognized Tribe, particularly when that same Tribe subsequently ceded the territory accompanying the property at issue to the United States.

⁴ This normally was accomplished by treaty or other agreement, generally with the consent of the Tribe.

⁵ Treaty provisions obligate the United States to protect the Tribes, externally and internally, thus providing a measure of authorization for congressional abrogations.

⁶ The Court also preserved a place for judicial activism in this arena.

powers.

I. **THE LEECH LAKE BAND OF CHIPPEWAS HAS NOT RELINQUISHED IN ANY TREATY ITS INHERENT SOVEREIGN POWER TO REACQUIRE AND RETURN LAND WITHIN ITS TERRITORY TO ITS PUBLIC DOMAIN.**

The Court has invoked American political thought specifically regarding treaties dealing with Tribes' land. The Court once explained, "To contend that the word 'allotted,' in reference to the land guaranteed to the Indians in certain treaties, indicates a favor conferred rather than a right acknowledged, would, it would seem to me, do injustice to the understanding of the parties." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582 (1832). In the treaty between the United States and the Leech Lake Band of Chippewa the Tribe did not relinquish its inherent sovereign powers to govern its territory to the extent recognized in *Johnson v. McIntosh*. *Id.* Therefore, the Tribe retains the power to acquire property within its territory and return that property to the Tribe's public domain.

The Tribe possesses the inherent power to authorize the United States and the State of Minnesota to impose ad valorem property taxes on allotments within the Tribe's territory. For example, the Court decided in *Goudy v. Meath*, 201 U.S. 146 (1906), that the State of Washington could impose an ad valorem property tax upon allotted land. However, in *Goudy* the Court relied upon specific treaty provisions in which the Puyallup Tribe authorized Congress to allot the reservation and to allow the State to impose such property taxes. *Goudy v. Meath*, 201 at 149. The treaty with the Leech Lake Band of Chippewa contains no provision authorizing either allotment or State taxation. Therefore, at the very least *Goudy* supports the contention that the Leech Lake Band of Chippewa did not authorize State taxation. Indeed, the absence of any authorizing language such as that relied upon in *Goudy*, that case suggests that

the General Allotment Act and the Burke Act's amendments were, in their entirety, unconstitutionally applied to the Leech Lake Band of Chippewa. The Leech Lake Band of Chippewa did not relinquish in any treaty the power to govern their territory, including the power to acquire private property within its territory for return to the Tribe's public domain.

II. **THE EXERCISE BY TRIBES OF THE POWER TO ACQUIRE PRIVATE PROPERTY AND RETURN IT TO THE TRIBE'S PUBLIC DOMAIN IS NOT INCONSISTENT WITH THEIR STATUS.**

Tribes' reacquisition of land within their territory for public domain purposes is not "inconsistent with their status." For example, many reservations were not subjected to allotment. Moreover, most reservations that were subjected to allotment were not allotted in their entirety. As a result, unallotted or partially allotted reservations continue to contain tribal public domain lands entirely consistently with the Tribe's status. Moreover, in the Indian Civil Rights Act of 1968, Congress expressly acknowledged that Tribes maintain their own public domain, including exercising eminent domain.⁷ Furthermore, in the Indian Land Consolidation Act, Congress specifically encouraged a policy of returning certain individually-held property interests to the Tribe's domain. 25 U.S.C. §2201. Therefore, the reacquisition and return of fee lands to the Tribe's public domain is entirely consistent with the Tribe's status.

Indeed, it would be inconsistent with their status to treat the Tribe as just another private landowner due to the Court's increasing concern with basic republican democracy, due process, and political

⁷ "No Indian Tribe in exercising powers of self-government shall: (5) take any private property for a public use without just compensation" Indian Civil Rights Act of 1968, 25 U.S.C., § 1302.

participation in the relationship between the States and the Tribes and their respective citizenries. In *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978), *Duro v. Reina*, 495 U.S. 676 (1990); *Brendale v. Confederated Tribe of Yakima*, 492 U.S. 408 (1989), the Court ruled against the Tribe's exercise of governing power over non-Members because their limited ability to participate in Tribe government. Yet the Tribe's ability to participate in the county's government is non-existent. Indeed, the Tribe's members' ability to participate in the county's government is impractical and antithetical to notions of republican democracy.

Congress has never made clear that the Tribe's members are citizens of the States and their subdivisions. The Constitution and the Fourteenth Amendment exclude "Indians not taxed," in reference to member Indians who live on their Tribe's reservation. The Indian Citizenship Act of 1924 and the various allotment acts extended national citizenship to Indians, including "Indian not taxed", but these acts did not extend State citizenship to such Indians. 8 U.S.C., § 1401(b). The reasoning behind these provisions comports with basic notions of republican democracy: those who did not bear the civic responsibilities of citizenship and government (taxation) should not benefit from the rights and privileges of citizenship and government, i.e. voting and holding office. Tribes and their resident members neither bear the responsibilities of State citizenship nor enjoy the rights of State citizenship.

Tribes and their members could enjoy the benefits of State citizenship only to the derogation of the basic axiom that government is by the governed. If resident members of the Leech Lake Band could fully participate in county processes, they could vote against any property taxes whatsoever or they could vote to increase them dramatically. Since most of them live on individually held trust property, they would not be affected either way. Meanwhile, the county's property taxes fund its public schools. Yet, the Tribe's members do not attend the county's public schools.

Indeed, a member of the Tribe who resides on trust land without property taxes could run for and win public office in the county. She would then be in the position of making laws by which she could not be forced to live.

Therefore, the county should not be able to tax the Tribe's land because the Tribe cannot participate in the county government. Indeed, the county should not be allowed to tax the property of the Tribe's members.

a. Lands Acquired by the Tribe Pursuant to Section 465 of the IRA Are Exempt From State and Local Taxation.

The Indian Reorganization Act of 1934 provided for restoring unallotted surplus Indian lands to tribal ownership. 48 Stat. 984, 25 U.S.C. § 463. In addition, the IRA authorized "reacquisition of allotted lands in trust." Furthermore, this reacquisition could be "within or without existing reservations." See § 465. The land at issue was reacquired by the Tribe pursuant to its IRA constitution and § 465.

In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), the Court decided that the Tribe must pay State income taxes derived from land acquired under § 465; however, the Court also decided that the Tribe need not pay personal property taxes on improvements attached to the land acquired under § 465. In *Mescalero* the Court's latter holding rested squarely on an underlying presumption that tribally-held property was not subject to State taxation.

In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), the Court based its affirmation of the State's ability to tax the gross receipts on revenues earned from an off-reservation Tribal enterprise but not on personalty that had been installed as a permanent improvement at the resort on the IRA. Section 465 exempts land acquired by a Tribe from local taxation. As previously stated, the

intent and purpose of the Reorganization Act was to 'rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.' H.R. Rep. No. 1804, 73d Cong., 2d Sess., 6 1934). Senator Wheeler specifically stated that:

"This bill . . . seeks to get away from the bureaucratic control of the Indian Department, and it seeks further to give the Indians *the control of their own affairs and of their own property*; to put it in the hands either of an Indian Council or in the hands of a corporation to be organized by the Indians" 78 Cong Rec. 11125.(emphasis added).

As articulated in *Mescalero*, notwithstanding the facts that the case involved lands not technically acquired in trust for the Indian Tribe, the IRA precludes the State from imposing its ad valorem taxes on property owned by the Tribe and on personalty permanently attached to the realty. *Mescalero*, 411 U.S. at 154. The Court reasoned that the IRA "did not strip Indian tribes and their reservation lands of their historic immunity from state and local control." and 'Nothing in this Act shall be construed as rendering the property of any Indian community ... subject to taxation by any State or subdivision thereof' *Id.*, (quoting from the predecessor bills to the Wheeler-Howard Act, H.R. 7902 and S. 2755, Tit. I, s 11. *Id.* at 5.)

III. CONGRESS HAS NEVER ABROGATED THE INHERENT POWERS OF THE TRIBE TO REACQUIRE PRIVATE PROPERTY AND RETURN IT TO THE TRIBE'S PUBLIC DOMAIN.

The Court has recognized the power of the United States to limit the Tribes' sovereignty. *Lonewolf v. Hitchcock*, 187 U.S. 553 (1903). Nonetheless, the Court has analyzed congressional acts

against the backdrop of treaties and the ensuing relationship between the United States and Tribes. In that light, the Court has required that such congressional statements be "unmistakably clear".

Assuming, *arguendo*, that Yakima stands for the proposition that the GAA and the Burke Act authorized State taxation of property held by the Tribe, Congress has never acted to abrogate the sovereign power of the Leech Lake Band of Chippewa to place such property back into the Tribe's public domain. Indeed, while the GAA has effectuated a private property system within the Tribe's boundaries, the acts did not abrogate the Tribes' inherent sovereign powers to govern that private property system or to regulate those allotments. As the Solicitor of the Department of the Interior, the federal administrative entity with primary responsibility over U.S. relations with Indian Tribes, wrote: "A tribe has the sovereign power to, among other things, regulate and perhaps proscribe use of reservation resources, including allottee resources."⁸ Therefore, Congress has never abrogated the Tribe's inherent sovereign power to acquire private property within its territory and to return that property to the Tribe's public domain.

a. The General Allotment Act Of 1887 Did Not On Its Face Authorize State Taxation Of Allotments

Although the Court has held the Dawes Act's allotment process constitutional,⁹ the provisions invoked by Cass County have never been upheld without treaty authorization. Cass County's reliance upon *Goudy* supports this contention. *Goudy* arose out of an 1854 treaty which expressly contemplated an action by Congress to allot the reservation and to authorize State taxation. *Goudy*, at 149.

⁸ Memorandum of Law by Solicitor of the U.S. Department of the Interior, John D. Leshy, dated March 30, 1995.

⁹ *In re Heff*, 197 U.S. 488 (1905).

The treaty in *Goudy* provided for allotment, adding that such allotments "shall be exempt from levy, sale, or forfeiture, which conditions shall continue in force until the State constitution ... and the legislature of the State shall remove the restrictions." *Id.* The treaty between the United States and the Leech Lake Band of Chippewa contains no such authorizing provision.

Furthermore, the 1854 treaty in *Goudy* provided that "No State legislature shall ... remove the restrictions herein provided for, without the consent of Congress." *Id.* Thus, the 1854 treaty, which was negotiated by the Executive Branch and ratified by the Legislative, reveals the mutual understanding that before the U.S. could infringe upon Tribes' sovereignty, the infringement must first have been authorized or consented to. To suggest that the allotment acts obtain the same results without such prior treaty authorization is to render the 1854 treaty fortuitous. Therefore, the *Goudy* analysis suggests that the General Allotment Act was an unconstitutional exercise of congressional power, both in its allotment and taxation provisions. Such a conclusion would comport with republican democracy's fundamental tenets of authorization and consent.

Nonetheless, even assuming that the GAA is generally constitutional, its provisions must be construed in light of the treaties, general rules of statutory construction, and federal policy. For example, the term "State law" in the GAA does not necessarily mean State jurisdiction. For example, in the Major Crimes Act, 25 U.S.C. § 1153, Congress wrote: "As used in this section, the offenses of burglary and incest shall be defined and punished in accordance with the laws of the State." Yet, neither the Executive nor the Court have ever interpreted this application of State law as also extending State jurisdiction. For another example, the Court in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), recognized that the Organized Crime Control Act "makes certain violations of State and local gambling laws violations of federal law." However, the Court then added, "[t]here is nothing in the OCCA indicating that

the States are to have any part in enforcing [the OCCA]." *California v. Cabazon Band of Mission Indians*, 480 U.S. at 212. Moreover, where Congress has intended to extend State jurisdiction it has done so unambiguously. In Public Law 83-280 Congress expressed its intent to apply State law and extend State jurisdiction, providing: "The consent of the United States is hereby given to any State not having jurisdiction over criminal offenses in Indian Country to assume such measures of jurisdiction, and the criminal laws of such State shall have the same force and effect as elsewhere in the State." Therefore, the GAA is not unmistakably clear and it applies only State law, not State taxation, and certainly not State jurisdiction.

IV. THE GENERAL ALLOTMENT ACT AND SUBSEQUENT LEGISLATION HAS NOT WAIVED TRIBES COMMON LAW IMMUNITY FROM SUIT.

Assuming again *arguendo* that the GAA allowed a permeation of the Tribe's sovereign sphere by allowing States to foreclose tax-delinquent land held in fee by individual allottees or their successors, a position to which Amici Tribes do not concede, that is an immeasurable distance from holding that the GAA abrogated the immunity of the Tribe itself, once the Tribe reacquires fee parcels or places its own parcels in fee.

"Indian Tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 435 U.S. 49, 58 (1978). "Although Congress has occasionally authorized limited classes of suits against Indian Tribes, it has never authorized suits to enforce tax assessments." *Oklahoma Tax Commission v. Citizens Band Potawatomi*, 498 U.S. 505, 510 (1991). The result reached in *Oklahoma Tax Commission* rested squarely on the doctrine of tribal sovereign immunity and the Court refused to narrowly construe the doctrine and to even abandon it in its entirety. *Id.* at 510. Moreover, the Court has recognized Congress' continuing approval of the

immunity doctrine. *Id.* at 510 (citing the Indian Financing Act of 1974, 88 Stat. 77, 25 U.S.C. §1451 *et seq.*, and the Indian Self-Determination and Education Assistance Act, 88 Stat. 2203, 25 U.S.C. §450 *et seq.* Against the backdrop of inherent Tribal governmental powers, this Court has utilized the rules for employing a waiver of tribal immunity identical to the rules applied for employing a waiver of state or federal immunity "because no principled reason requires a different treatment." *Merriion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982).

Nothing in either the GAA or the Burke Act or the legislative history, confers upon states the authority to impose any of its laws on a Tribe government. Notwithstanding the Acts' purpose to assimilate Indians into the mainstream culture, Congress maintained and distinguished the existence and continuing vitality of the sovereignty of Tribes' over their territory with individual Indians, who had the choice of maintaining their political alliance with their Tribe or severing those ties entirely. [cite to Section 6 of the GAA]. Moreover, Section 5 specifically reflects this acknowledgment by explicitly reserving the Tribes' rights to release any surplus lands it may choose to sell within its territory for homesteading purposes.

While this acknowledgment became legislatively effectual with the enactment of the IRA, Executive branch officials have consistently recognized that Indian tribes possess all the attributes of a sovereign necessary to control economic activity within its jurisdiction and to effectively manage its territory, 17 Op. Atty. Gen. 134 (1881); 7 Op. Atty. Gen. 174 (1855), including the jurisdiction to tax, 23 Op. Atty. Gen. 214 (1900); *Powers of Indian Tribes*, 55 L.D. 14, 46 (1934).

"Chief among the powers of sovereignty recognized as pertaining to an Indian Tribe is the power of taxation. Except where Congress has provided otherwise, this power may be exercised over members

of the tribe and over non-members as far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions." *Ibid.*

Further, this Court has recognized that "Indian Tribes within Indian Country are a good deal more than 'private, voluntary organizations.'" *United States v. Mazurie*, 419 U.S. 544, 557 (1975). This distinction between Tribes as governments and Indian people as individuals is crucial to the finding that Congress did not confer any state authority over Indian Tribes. What the Petitioners beg the Court to imply in the GAA is a congressional diminishment of a Tribe from its governmental status to a status equivalent to a taxable subdivision of the State simply by the Tribe's mere existence within the State's boundaries. This logic flies in the face of long-standing precedent and numerous legislation specifically preserving and enhancing the Tribes' governmental status and encouraging exercise of its governmental sovereign powers. *See supra* note 11. This acknowledgment of the territorial imperative to tribal sovereignty is reflected in the Indian Civil Rights Act of 1968, 25 U.S.C. §§1301-1303, which affirmed the Tribes' right to take land into their public domain. Section 1302(5) specifically requires a Tribe to provide just compensation for any private property over which it may exercise eminent domain.

Notwithstanding the Petitioner's unsupportable position, the resultant impact would divest the Tribes of the ability to create programs and initiate governmental action within their territory to implement the legislative provisions and other objectives inherent in the self-determination policy. In *Buster v. Wright*, 135 F. 947 (CA8 (1905), the Court concluded that "[n]either the United States, nor a state, nor any other sovereignty loses the power to govern the people within its borders by the existence of towns and cities therein endowed with the usual powers of municipalities, nor by the ownership nor occupancy of the land within its territorial

jurisdiction by citizens or foreigners." 135 F., at 952. (emphasis added). This notion reflects the integral role of territory and collective rights in sovereign governments, and the continuing vitality of Tribe governments is dependent upon the Courts recognition of this principle. This, when measured against the protectable collective right of the Tribes in the present case, identifies two independent but related barriers to the exercise of state authority within the territory of an Indian Tribe, state's authority may be preempted by federal law, or it may interfere with the Tribe's ability to exercise its sovereign functions. *Bracker*, 448 U.S. at 152, (citing U. S. CONSTITUTION. art. I, §8, cl.3). Moreover, the Court has set forth well-established principles prohibiting individual states from levying taxes on Indian or tribally-owned property. *Pimalco, Inc. v. Maricopa County*, 937 P.2d 1198,1203 (1997)(citing *McClanahan*, 411 U.S. 164, 170-71 (1973), *Oklahoma Tax Commission*, at 366-67; *Confederated Tribes of Colville*, at 152, *Moe*, at 480-81, *Industrial Uranium Co. v. State Tax Comm'n of Arizona*, 95 Ariz. 130, 134, 387 P.2d 1013, 1015-16 (1963).

By focusing on the narrow inquiry of who owns the title to a particular parcel, the *Yakima* Court wholly ignored the quintessential power inherent in territory. This departure from generally accepted powers to regulate derives from a perspective that does not view territory as a constitutive element of group identity. The Tribes' rights are not derived solely from membership based principles, but from the fact that territory is politically contingent and a vital component of self-governance. Territory is imperative to tribal sovereignty.

The Court's long line of precedent invoking the Canons of Construction, federal preemption doctrine, and the "unmistakably clear intent" rule, and Congress' policy of Tribal self-determination all would be unilaterally reversed were States allowed to systematically foreclose against every parcel owned by the Tribe or its members and thereby reduce the Tribe's tax base. Taxation of a

Tribe is tantamount to diminishment, and the Court has set forth specific prerequisites to diminishment, not the least of which is just compensation. *Solem v. Bartlett*, 465 U.S. 463 (1984) *Hagen v. Utah*, 510 U.S. 399 (1994). Notwithstanding, the first governing principle is that "[o]nly Congress can divest a reservation of its land. *Id.* at 470. Moreover, once land has been set aside for an Indian Reservation, irrespective of the title of individual plots within the Tribe's territory, "the entire block retains its reservation status until Congress explicitly indicates otherwise." See *United States v. Celestine*, 215 U.S. 278, 285 (1909). The statutory definition of Indian country as all lands within the limits of Indian reservations reflects the principle that "Indian country" is not a concept simply relegated to property, but territory. Thus, by looking at Indian sovereignty by determining who owns individual parcels of the soil, rather than viewing it in terms of the territorial bounds of the sovereign, reduces Tribes to little more than "private, voluntary organizations." *U.S. v. Mazurie*, 419 U.S. at 557.

As the twenty-first century approaches, Tribes across the continent have, as a matter of practicality and necessity, continued to utilize that sovereign power within their territories. Tribes utilize their territorial governance as any other government does, to encourage productivity, to regulate land use, to site housing projects, landfills, hospitals, and lagoons, and to preserve the public domain.

Any sovereign possesses the prerogative to acquire fee land and to continue to hold it in fee. If a Tribe acquires fee land outside its reservation, that land continues to be held in fee by the Tribe and is subject to taxation by the jurisdiction in which it sits. However, if a Tribe acquires fee land inside the reservation, the legal outcome is not so clear. A Tribe's fee ownership of on-reservation lands raises issues of jurisdiction, taxation, and sovereign immunity.

Thus, if a Tribe acquires non-Member owned, on-reservation fee land which has been legally determined to be subject to State

taxation and continues to hold that land in fee status, then that land may be subject to continued taxation. This, at least, represents the facts presented by *Yakima*.

However, if a Tribe acquires land within the reservation and chooses not to continue to hold the land in fee, but to return the land to its public domain, that too is its sovereign prerogative. After all, land within a Tribe's reservation that acquires fee status does not necessarily fall outside the Tribes' domain. The Court's decisions in Montana and Brendale illustrate that land may be held in fee, even by non-members of the Tribe, and still be subject to the Tribe's governance. Indeed, the Court's opinion in *Yakima*, which limited the State's taxation to the land itself and disallowed the excise tax, further shows that the Tribe continues to hold some measure of territorial governance over these parcels of individually held private property.

Therefore, one attribute of the Tribes' governance must be to acquire land in fee and return it to the Tribe's public domain, as any other sovereign might do. Unlike the Tribe in *Yakima*, the Leech Lake Band returned the reacquired parcels back into its public domain. In fact, Cass County acquiesced to this arrangement and did not pursue taxation on the parcels until the *Yakima* decision.

If the Court imposes a fee ownership upon the Tribe, as opposed to holding the land as part of the Tribe's public domain and trust, then the Tribe will be forced, as a Tribe, to act collectively in carrying out the primary purposes for which the ILCA was enacted -- to return the land to economic productivity. Rather than as a government, redistributing the land into private hands to be held individually, to foster individual entrepreneurship. If the Court insists that Tribes hold land as a private owner rather than as a governing sovereign, the Court will have stifled the ability of the Tribe to re-issue title to land to truly private parties in order to make it economically productive. In short, the Court will have imposed

communism upon the Tribes.

Part of the confusion evolves from the misuse of the term "trust" in many case involving Tribes. The territories which constituted the Tribes' public domain are not in "trust" in the same sense that individually held allotments are held in trust. The General Allotment Act applied the legal term "trust" only to the individually-held allotments established by that Act. However, the term "trust" has also, mostly in the scholarship, been analogically applied to lands within the tribes' territory which were not allotted -- that is, lands held either collectively or privately under the Tribes' governance prior to the GAA -- simply because such lands contained some characteristics of trust allotments contained, i.e., could not be acquired by anyone but the United States. While this use of the term "trust" presents a convenient analogy, it is also an misapplication of the term.

Historically, this right to acquire the Tribes' territory belonged to the discovering European nation. Prior to the American revolution England, France, and Spain fought wars over this discovery right. However, upon declaring and winning their independence, the colonies succeeded to the rights of discovery formerly held by the European governments. Subsequently, upon forming the United States, they in turn granted that discovery power to the Union in the Commerce Clause. Finally, to codify matters, the Federal government promptly enacted the Trade and Intercourse Act which restricted to itself all acquisition of Tribe territories.

Therefore, it is because of the Discovery doctrine and its progeny -- delegation to the Union by the States in the Commerce Clause and codified in the Trade and Intercourse Acts -- that the territories or lands held collectively by the Tribe are not subject to acquisition by foreign states, the several States of the Union, or their individual citizens. The General Allotment Act did not restrict the acquisition of such lands. Thus, such lands are not subsumed into

that property concept of "trust" in the sense that the word is applied to individually held allotments.

If, in the commerce clause, the States can have authorized Congress to unilaterally acquire Tribes' territory and grant it to a State, then certainly those same States can have authorized Congress to also acquire lands within a State and return it to a Tribe. Otherwise, what principle of republican democracy would recognize in Congress more power over those who do not authorize that power than over those who do authorize that power? Further, Congressional authorization must be read to authorize the acquisition and consolidation of lands as Tribes hold lands.

This background is necessary for three reason:

- 1) restriction on acquisition versus restraint on alienation
- 2) Tribes govern territories and hold lands in a public domain and trust

V. CO-EXISTENT STATUTES MUST BE INTERPRETED IN LIGHT OF INTERVENING LEGISLATIVE ENACTMENTS.

- a. **The *Yakima* court misapplied the "per se" rule regarding State taxation in Indian Country and therefore must be overturned.**

First, the Court in *County of Yakima v. Yakima Indian Nation*, 502, Us. 251 (1992), examined the General Allotment Act, ch. 119, 24 Stat. 388 (1887)(hereinafter "GAA") and held that state taxation authority was conferred with respect to fee-patented Indian lands by Section 6 of the Act which provided that "each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside." 24 Stat. 390, *Yakima*, at 689-93. Second, it held that such authority was not terminated by the subsequently enacted Indian Reorganization Act of 1934, 25 U.S.C. secs. 461-

479(1988)(hereinafter "IRA") because Congress chose not to return allotted lands to their pre-allotted status. *Id.* Irrespective of the Amici Tribes' position that the transfer of taxation laws of the State does not automatically confer the State's jurisdiction, the Court's long-standing reliance upon federal preemption was ignored in *Yakima*.

- b. **Federal Pre-emption Analysis is the Correct Standard to Apply to the question of whether the States have the taxation authority over Indian Tribes and their members.**

Under the Supremacy Clause, from which the preemption doctrine is derived, "any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Felder v. Casey*, 487 U.S. 131, 138 (1988) (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)). Clearly, the state's taxation authority must derive from enacted law. Such taxation authority flowing from such law is in direct conflict with subsequent legislation specifically enacted to counter the devastating effects of the allotment policy. Congress has enacted numerous statutes intended to counter the destructive effects felt by the allotment era.¹⁰

¹⁰Notwithstanding the most stark example of repudiation of the allotment policy and its effects in IRA, see e.g. The American Indian Agricultural Resource Management Act, 25 U.S.C. 3701-3745 (1994)(requiring agricultural practices in Indian Country to be more responsive to the political processes of the Tribes); Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 (1988)(providing for the maximization of tribal jurisdiction over state jurisdiction in adoption and child custody proceedings involving tribal members or those eligible for tribal membership); Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (1988) (providing for a comprehensive regulatory scheme over bingo and other gambling operations in Indian Country, specifically to promote tribal economic

Further, the Court has consistently held in a long line of Supremacy Clause cases that any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause. See *Perez v. Campbell*, 402 U.S. 637 (1971); *Hines v. Davidowitz*, 312 U.S. 62 (1941). The Court's refusal in *Yakima* to impart any weight to the numerous, complex, intervening statutes that unequivocally reflect an undisputed transition in federal Indian policy contravenes the very principal upon which the Supremacy Clause and statutory interpretation cases are premised.

In the case of *West Virginia University Hospital, Inc. v. Casey*, 499 U.S. 83 (1991), the issue was whether the term "attorney's fee" in sec. 1988 provided explicit statutory authority for reimbursement of expert witness fees. In finding that no authority existed, the Court based its reasoning on congressional intent embodied in previously and subsequently enacted law.¹¹ The Court viewed its role as making

development, tribal self-sufficiency, and strong tribal government); Indian Tribal Government Tax Status Act of 1982, Pub. L. No. 97-473, 96 Stat. 2607 (codified in scattered sections of 26 U.S.C.)(granting to Tribes a favorable tax status similar to local and state governments, intended to enhance tribal economic development); Indian Land Consolidation Act, 25 U.S.C., §§ 2201-2211 (1988)(establishing a scheme for Tribes to expand and consolidate their land holdings); Native American Languages Act, 25 U.S.C. §§ 2901-2906 (Supp. II 1990)(acknowledging the special status of Native Americans, which recognizes "distinct cultural and political rights, including the right to continue separate identities.").

¹¹This portion of the amicus argument relies on the reasoning used in the *West Virginia* opinion, not the specific holding in this case. Congress passed the Civil Rights Act of 1991, 25 U.S.C. sec. 1301-1341, specifically to prospectively produce an outcome opposite to the holding in *West Virginia*. While Congressional acts can change future results, they do not technically reverse the holding or

"sense rather than nonsense out of the corpus juris", it not being their "function to eliminate clearly expressed inconsistency of policy and to treat alike subjects that different Congresses have chosen to treat differently. *Id.* at 101. Rather than making sense out of the contradictions embodied in the allotment policy and the congressional attempts to mitigate the damage¹², the *Yakima* Court based its opinion on its own intuition that "it would be 'strange' for land to be alienable and encumberable yet not taxable." *Yakima*, at 690-691. While Congress may have acted strange, it is equally strange for the Court to infer congressional intent on their own second sight while maintaining an unmistakably clear intent standard. This reasoning flies in the face of previously held cases which rejected judicial enlargement of a statute. This Court has stated that to "to supply omissions transcends the judicial function." *Id.* (citing *Iselin v. United States*, 270 U.S. 245, 250-251 (1926).

The implications of state taxes imposed on transactions and activities occurring on Indian reservations was analyzed in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1979). The Court reached the conclusion that the state's taxes are applicable to purchases made by nonmembers against the backdrop of the overriding federal interest,

reasoning of a case already decided in its absence. *Crumley v. Delaware State College*, 797 F.Supp. 341, 344 n.2 (D.Delaware 1992). Thus, it is appropriate to rely on the same reasoning used in the *West Virginia* decision without regard to the effect of the subsequent federal act.

¹²See generally Institute for Gov't Research, *The Problem of Indian Administration* 3-51 (1928), making numerous findings on the failure of the assimilationist policy and concluding that the administration of Indian policy neither encouraged nor supported Indian self-sufficiency, and accordingly, recommended immediate resolution of this deficiency. *Id.* at 21-22.

stating that "tribal sovereignty is dependent on, and subordinate to, only the Federal government, not the States." *Id.* at 154.

This Court has consistently relied upon a flexible pre-emption analysis "sensitive to the particular facts and legislation involved." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989). Moreover, the determination of whether federal legislation has preempted state taxation, "primarily an exercise in examining congressional intent, the history of tribal sovereignty serves as a necessary "backdrop" to that process." *Cf. Rice v. Rehner*, 463 U.S., 713, 719 (1983)(quoting *McClanahan*, 411 U.S. at 172). It logically follows that each case "requires a particularized examination of the relevant state, federal, and tribal interests." *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 838 (1982). In examining the various interests, however, the Court has held that "although state interests must be given weight and courts should be careful not to make legislative decisions in the absence of congressional action, ambiguities in federal law are, as a rule, resolved in favor of tribal independence." *Id.*

Thus, the Court's accurate analysis to the question of whether a State may encroach upon Tribe's sovereignty by taxing its land requires recognition of, and consideration for, the long standing federal policies adopted to correct the devastating effects of the allotment era and sanction the integrity of the Nation's Indian Tribes.

Finally, part of the preemption analysis includes not only the specific law in question but the state law's actual effect, *English v. General Electric Co.*, 496 U.S. 72 (1990) (citing *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190 (1983) and where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, *Hines v. Davidowitz*, 312 U.S. 52 (1941). In *English*, the Court held that a state tort claim was not pre-empted by a federal whistle-blower provision because the state

law did not have a "direct and substantial effect" on the federal scheme. *English*, 496 U.S. at 85.

With the IRA, Congress officially halted the allotment actions and formally repudiated the assimilation policy. While it is undisputed that Congress did not restore fee-patented or homesteaded lands to tribal ownership, it is understandable in light of the vast number of acres lost, *See Francis P. Prucha, The Great Father*, (abridged ed. 1986), and Congress' refusal to grant immunity from state taxation to non-Indian landowners. Thus, halting the allotment process can best be viewed as a choice by Congress to effectuate a less daunting task to reversing the irreparable damage caused by allotment and not as an implied continuance of State taxation authority upon Tribes. Through the IRA, Congress established a new federal Indian policy, supplemented by subsequent legislation, which promotes tribal autonomy and self-determination. "*The Forgotten American*": *The President's Message to the Congress on Goals and Programs for the American Indians*, PUB. PAPERS 335 (1968-69).

Our precedents leave no doubt that state and local laws enacted for the purpose of diminishing Tribes' land bases have a "direct and substantial effect on the federal scheme to "promote tribal self-determination, economic development and cultural plurality." ¹³ The taxation by states and local governments of land governed by an Indian Tribe or owned by its members defeat the congressional purpose and must not be allowed. The conception of Tribe sovereignty that this Court has consistently reaffirmed permits no other conclusion.

CONCLUSION

¹³See Cohen's Handbook of Federal Indian Law, 147 (Rennard Strickland et al. eds., 1982)(describing congressional reasoning behind the IRA).

In recent years, the Court has given little or no heed to congressional goals of Tribe self-determination in analyzing Tribes' authority over activities and land within their territory, slowly eroding any meaningful exercise of self-government. It has inconsistently applied the canons of construction. It has inconsistently applied or wholly ignored the well-established preemption doctrine and "unmistakably clear" intent rule, picking and choosing when it is applied and when it is not, as evidenced by the long line of non-Indian law cases, which are consistent in their reliance on such precedent. It has resurrected the long repudiated allotment era to deprive tribes of lands set aside by Congress and reserved in the Treaties as tribal territories. More significantly, it has ignored the plenary power in Congress and residual tribal sovereignty in the tribes. By holding that the States may not encroach upon a Tribe's sovereignty and diminish its land base through taxation, the Court will advance toward removing the analytical flaws set forth in *Yakima* adhering to the well-established interpretive rules, precedent, and federal policy.

In The
Supreme Court of the United States
October Term, 1997

CASS COUNTY, MINNESOTA, *et. al*,
Petitioners,
vs.
LEECH LAKE BAND OF CHIPPEWA INDIANS,
Respondent.

On Writ of Certiorari
To The United States Court of Appeals
For the Eighth Circuit

BRIEF OF *AMICUS CURIAE*
ONEIDA INDIAN NATION OF NEW YORK
IN SUPPORT OF THE RESPONDENT

William W. Taylor, III
Counsel of Record
Michael R. Smith
Eleanor H. Smith

ZUCKERMAN, SPAEDER, GOLDSTEIN,
TAYLOR & KOLKER, L.L.P.
1201 Connecticut Avenue, N.W.
Washington, D.C. 20036-2638
Telephone (202) 778-1800
Counsel for Amicus Curiae

January 20, 1998

(i)

QUESTION PRESENTED

When an Indian tribe repurchases reservation land previously alienated to non-Indians by Congress, does the power of state and local governments to tax that land require the unmistakably clear statutory expression of the intent of Congress to permit state taxation, or merely the recordation of these repurchases in state or local land records?

(ii)

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
INTEREST OF <i>AMICUS CURIAE</i>	1
STATEMENT OF THE CASE	3
ARGUMENT	5
THE SUGGESTION BY <i>AMICI</i> STATES AND STATE ASSOCIATIONS THAT ALL FEE LAND OF INDIAN TRIBES IS TAXABLE, REGARDLESS OF CONGRESSIONAL INTENT, IS AT ODDS WITH THIS COURT'S PRECEDENTS AND SHOULD BE REJECTED.	5
CONCLUSION	11

(iii)

TABLE OF AUTHORITIES

	Page
<u>Cases</u>	
<i>Bryan v. Itasca County</i> , 426 U.S. 373 (1976)	5, 9
<i>California v. Cabazon Band of Mission Indians</i> , 480 U.S. 202 (1987)	5, 6
<i>County of Oneida v. Oneida Indian Nation</i> , 470 U.S. 226 (1985)	passim
<i>County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation</i> , 502 U.S. 251 (1992)	3 - 5
<i>Federal Power Comm'n v. Tuscarora Indian Nation</i> , 362 U.S. 99 (1960)	7
<i>Kansas Indians</i> , 72 U.S. (5 Wall.) 737 (1867).	5
<i>Leech Lake Band of Chippewa Indians v. Cass County</i> , 108 F.3d 820 (8th Cir. 1997)	3
<i>Mattz v. Arnett</i> , 412 U.S. 481 (1973)	10

<i>McClanahan v. Arizona State Tax Comm'n</i> , 411 U.S. 164 (1973)	5
<i>Moe v. Confederated Salish & Kootenai Tribes</i> , 425 U.S. 463 (1976)	5
<i>Montana v. Blackfeet Tribe</i> , 471 U.S. 759 (1985)	3, 5
<i>New York Indians</i> , 72 U.S. (5 Wall.) 761 (1866)	5, 8
<i>Oklahoma Tax Comm'n v. Chickasaw Nation</i> , 515 U.S. 759, 766 (1985)	5
<i>Oklahoma Tax Comm'n v. Sac & Fox Nation</i> , 508 U.S. 114 (1993)	5
<i>Oneida Indian Nation v. County of Oneida</i> 414 U.S. 661 (1974)	9
<i>Thompson v. County of Franklin</i> , 1997 U.S. Dist. LEXIS 19832 (N.D.N.Y., Dec. 5, 1997) .	4
<i>Tulee v. Washington</i> , 315 U.S. 681	5
<i>United States v. Candelaria</i> , 271 U.S. 432 (1926)	7
<i>Warren Trading Post v. Arizona Tax Comm'n</i> , 380 U.S. 685 (1965)	5

<i>Worcester v. Georgia</i> , 31 U.S. 515 (1832)	6
---	---

Statutes and Treaties

1 Stat. 137 (Jul. 22, 1790)	9
7 Stat. 44 (Nov. 11, 1794)	1
25 Stat. 642 (Jan. 14, 1889)	3
18 U.S.C. § 1166-68	2
25 U.S.C. § 177	7
25 U.S.C. § 233	9
28 U.S.C. § 2701-21	2
28 U.S.C. § 1360	9
N.Y. Real Prop. Tax § 454 (McKinney 1984 and Supp. 1997) 9 - 10	

Other Authorities

58 Fed. Reg. 33160 (Jun. 15, 1993)	2
--	---

INTEREST OF *AMICUS CURIAE*

Amicus Curiae the Oneida Indian Nation of New York ("Oneida Nation") is a federally recognized Indian nation.^{1/} This Court upheld the Oneida Nation's right to possession of land reserved to it by agreement with the United States in the 1794 Treaty of Canandaigua, 7 Stat. 44, and taken from the Oneida Nation by the State of New York in violation of the Indian Trade and Intercourse Act ("Nonintercourse Act"). *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) ("*Oneida I*").

In *Oneida II*, this Court recognized that the Oneida Nation has both aboriginal and treaty title to its reservation land. Since this Court's decision in *Oneida II*, and while the Oneida Nation pursues the resolution of its land claims, the Oneida Nation has been repossessing its reservation land by paying current occupants to leave. The Oneida Nation has repossessed about 4,000 acres this way. The Oneida Nation believes that the immunity of its repossessed reservation land from state taxation is beyond dispute.

The Oneida Nation submits this brief in support of the position of Respondent Leech Lake Band of Chippewa Indians ("Leech Lake Band" or "Band") and to urge affirmance of the decision of the United States Court of Appeals for the Eighth Circuit. The

^{1/} Counsel for the parties have consented to the filing of this *amicus curiae* brief. Their letters of consent have been filed with the Clerk of the Court pursuant to Rule 37.3 of the Rules of this Court.

Pursuant to Rule 37.6 of the Rules of this Court, *Amicus* states that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *Amicus* or its counsel, has made a monetary contribution to the preparation or submission of this brief.

Oneida Nation also responds to the suggestion by *Amici* States and their political subdivisions that they may ignore Congressional intent and tax all lands of Indian tribes the title to which is recorded in state or local land records.^{2/} In support of their suggestion, *Amici* State Associations identify the land repossessed by the Oneida Nation as land that should be taxable by state and local governments. Their suggestion flatly contradicts 200 years of Congressional will and this Court's precedents, including *Oneida II*. It is plainly wrong, and furthermore, invites the Court to decide this case by resolving a question that this case does not present.^{3/}

^{2/} Brief of the National Association of Counties, National Governors' Association, National League of Cities, National Conference of State Legislatures, U.S. Conference of Mayors, International City/County Management Association, International Municipal Lawyers Association, and Council of State Governments as *Amici Curiae* in Support of Petitioners ("State Association *Amici* Brief") at 22, 24, and 26 n.20; Brief of *Amici Curiae* States of Michigan, Alabama, California, Colorado, Idaho, Iowa, Montana, New York, Oklahoma, and Utah in Support of Petitioners ("State *Amici* Brief") at 2 and 15.

^{3/} The Oneida Nation corrects factual misstatements by the *Amici* State Associations. Contrary to the representations by the State Associations in their *Amici* Brief at page 22, the Oneida Nation's voluntary grants to school districts are not related to trust applications. Title to Oneida Nation reservation land is not held in trust by the United States, but by the Nation. Nor are these grants the result of negotiations pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-21 and 18 U.S.C. §§ 1166-68, as the State Associations represent. State Association *Amici* Brief at 23 n. 17. IGRA does not authorize state taxation of Indian tribes or their land. 25 U.S.C. § 2710(d)(3)(C). The gaming compact negotiations between the Oneida Nation and the State of New York took place in 1992 and 1993. The compact was signed by the Secretary of the Interior of the United States on June 4, 1993. 58 Fed. Reg. 33160 (June 15, 1993). The Nation announced its grant program in 1996, long after the Compact negotiations had ended.

STATEMENT OF THE CASE

This case is about statutory interpretation. At issue is whether Congress provided in Sections 4 and 5 of the Nelson Act, 25 Stat. 642, §§ 4 and 5, for taxation of land held by the Leech Lake Band within its reservation. The Court of Appeals correctly held that Congress did not. *Leech Lake Band of Chippewa Indians v. Cass County*, 108 F.3d 820, 830 (8th Cir. 1997).

The parties to this action agree that Congress made alienable the Leech Lake Band reservation land pursuant to the Nelson Act, 25 Stat. 642. They differ over whether, by making this reservation land alienable, Congress made "unmistakably clear" its intention to waive Leech Lake Band's tribal immunity to state *ad valorem* taxation of that land when it is repossessed by the Band. See *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 258 (1992) (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985)). Petitioner Cass County, Minnesota accepts that if Congress was not clear about taxation in the Nelson Act, Cass County may not impose its *ad valorem* tax on Leech Lake Band land. Brief for the Petitioner at 12 (quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. at 765).

Amici States and their political subdivisions urge that Congressional intent is not relevant and that the sole determinant of taxability of land held by an Indian tribe is whether that land is recorded as owned by the tribe in state or local land records, i.e., in "fee simple." Specifically, they seek a "rule for the *ad valorem* taxation of parcels owned in fee by Indians or Indian tribes within Indian country." State Association *Amici* Brief at 24; see also State *Amici* Brief at 15 (urging taxability by states of "all reservation lands owned in fee by a tribe") (emphasis in original). The *Amici* States

and State Associations acknowledge that they seek to avoid having to refer to federal treaties and statutes to determine whether Congress clearly made the land in question taxable. State Association *Amici* Brief at 2, 24-25; State *Amici* Brief at 15; see also State *Amici* Brief at 2, citing *Thompson v. County of Franklin*, 1997 U.S. Dist. LEXIS 19832, at * 51-52 (N.D.N.Y. December 5, 1997)("[T]he County takes the position that it . . . is entitled to tax [Indian] plaintiff's property, even in the absence of a congressional act.").

By referring to the state and local land records and tax rolls, rather than to federal law, to determine tribal immunity from taxation, the states also intend to gain the power, for example, to "preclude questionable land development practices." State Associations *Amici* Brief at 12. The states thus intend to use their taxing and regulatory power to override the decisions of tribal governments.

The *Amici* State Associations identify the Oneida Nation as an Indian tribe that has repossessed its reservation land and imply that its land should be taxable. State Associations *Amici* Brief at 26 n.20. Neither they nor the *Amici* States make reference to *Oneida II*, which holds that Oneida Nation land was unlawfully taken without the approval of Congress in transactions that are "void *ab initio*." 470 U.S. at 233. The *Amici* States and State Associations urge that *Yakima*, 502 U.S. 251, supports a holding in this case that all Indian land titled in fee simple in state or local land records is taxable. They do not acknowledge that such land often is restricted against alienation and taxation by federal law, and that its alienation by the states was and is illegal. In particular, they fail to explain that many fee simple title recordations by Indian tribes are made for the very purpose of erasing any and all title claims of non-Indians who possessed the land illegally.

ARGUMENT

THE SUGGESTION BY *AMICI* STATES AND STATE ASSOCIATIONS THAT ALL FEE LAND OF INDIAN TRIBES IS TAXABLE, REGARDLESS OF CONGRESSIONAL INTENT, IS AT ODDS WITH THIS COURT'S PRECEDENTS AND SHOULD BE REJECTED.

The power of states to tax Indian tribes and Indian land is a matter of federal law. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973). In recognition of the threat to Indian sovereignty posed by state taxation, this Court has articulated a *per se* rule against state taxation of Indians, Indian tribes, and their property, unless Congress has "made its intention to [allow taxation] unmistakably clear." *Yakima*, 502 U.S. at 258 (internal quotations omitted).^{4/} In *Yakima*, this Court found that the General Allotment

^{4/} This Court has consistently applied the *per se* rule against state taxation of Indians and Indian property to a wide range of state taxes. See, e.g., *New York Indians*, 72 U.S. (5 Wall.) 761, 770 (1866) (real property taxes); *Kansas Indians*, 72 U.S. (5 Wall.) 737, 755 (1867) (same); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973) (net income tax); *Bryan v. Itasca County*, 426 U.S. 373, 376 (1976) (personal property tax); *Warren Trading Post v. Arizona Tax Comm'n*, 380 U.S. 685, 691 (1965) (gross receipts tax); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (royalties); *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 115 S. Ct. 2214, 2217 (1995) (motor fuel and income taxes); *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 118 (1993) (same); *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 267 (1992) (excise taxes); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 477 (1976) (cigarette excise tax and vendor's license fees); *Tulee v. Washington*, 315 U.S. 681, 685 (1942) (hunting and fishing fees); see also *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987)(discussing *per se* rule).

Act unmistakably authorized state *ad valorem*, but not excise, taxes on Yakima reservation land that had been alienated by Congress.^{5/}

An Indian tribe's "title" in state land records does not determine its taxability. Many Indian tribes in what is now the eastern United States have what is called "aboriginal" title and many tribes also have title recognized by treaties. The Oneida Nation has both aboriginal and treaty title to its reservation land. This Court has acknowledged the Oneida Nation's federally recognized title. *Oneida II*, 470 U.S. at 234-36. The federally recognized title to land held by Indian tribes is not diminished by recordation of that land ownership with the state. It is repugnant to 200 years of decisional authority to suggest that states can ignore an Indian tribe's federally recognized title to land.

Amici States and State Associations seem to assume that tribal land held in fee simple title is freely alienable. See State *Amici* Brief and State Association *Amici* Brief *passim*. This is not true for two reasons. First, the Indian tribe may have federally recognized title to the land (e.g., a treaty), and it is clear that such land is not alienable pursuant to the Nonintercourse Act. *Oneida II*, 470 U.S. at 233 (1985). Second, the Nonintercourse Act on its face restricts

^{5/} The suggestion of *Amici* State and State Associations goes beyond taxes. Wholesale application of state laws to Indian land is the necessary implication of the suggestion by *Amici* States and State Associations. State Association *Amici* Brief at 12 (urging this Court to permit states to "preclude questionable land development practices" of Indian tribes). They therefore seek to overturn the broader rule prohibiting the application of state regulatory law to Indian tribes and their land absent federal consent. See, e.g., *Worcester v. Georgia*, 31 U.S. 515, 561 (1832) (states are without authority to apply their laws to Indian tribes absent Congressional consent); *Cabazon*, 480 U.S. at 221-22 (same).

alienability of all tribal land, whether or not an Indian tribe has aboriginal or other federally recognized title. 25 U.S.C. § 177; *United States v. Candelaria*, 271 U.S. 432, 442 (1926) (applying Nonintercourse Act to tribal land titled in fee simple); *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 118-119 (1960) (same). The Nonintercourse Act provides that "[n]o purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." *Id.*

This Court has held that the land of the Oneida Nation, which was neither allotted nor alienated by Congress, was illegally taken by the State of New York. Efforts to transfer this land away from the Oneida Nation are "void *ab initio*" precisely because of the absence of Congressional consent to the transfers. *Oneida II*, 470 U.S. at 245-46. The rule that transfers without Congressional consent are void *ab initio* would be destroyed by a rule that states may tax and regulate such land held by the Indian tribe today because non-Indians illegally occupied the land in the interim.

After this Court held the transfers of Oneida Nation land to the State of New York void *ab initio*, the Oneida Nation had a choice about the manner in which it would repossess the land to which it holds federally recognized title. It could sue to eject current occupants, but that would create unnecessary hostility and hardship for these neighbors of the Oneida Nation. Or it could, by agreement with occupants willing to leave, end their claims to so-called "title."^{6/}

^{6/} A typical quit claim deed to the Oneida Nation contains the following language:

The Oneida Nation has been paying fair market value or greater to repossess its land. This orderly and fair approach to rectifying illegal state action long ago cannot be the basis for diminishing Oneida Nation sovereignty over its own land. Otherwise, the Oneida Nation will be forced to abandon non-disruptive, market-oriented solutions to repossession of its lands.

It also is not accurate for the *Amici* States and State Associations to suggest that title to all Indian land must be held in trust by the United States to avoid state taxes and regulation. State *Amici* Brief at 11; State Association *Amici* Brief at 2 and 21-23. They are mistaken for three reasons. First, this Court has held that land titled to an Indian tribe and restricted against alienation is not taxable. See, e.g., *New York Indians*, 72 U.S. (5 Wall.) 761, 770 (1866). In *New York Indians*, this Court voided New York State property taxes on reservation land to which the Seneca Nation held title, holding that state taxes violated the restriction against alienation contained in the Treaty of Canandaigua. The Seneca land was not held in trust by the United States. Second, requiring trust status for Indian land to prevent taxation is fundamentally inconsistent with this Court's decision in *Oneida II*, in which this Court upheld the Oneida Nation's title to its land and its right to repossess that land as its own. 470 U.S. at 233. Third, Congress would not have passed the Nonintercourse Act if trust land status were the *sine qua non* of

Grantor acknowledges that Grantee asserts certain rights (from time immemorial and under the Treaty of Canandaigua executed between the Grantee and the United States of America on November 11, 1794) to the property that is the subject of this Deed, and in accordance therewith, Grantor agrees (a) to leave, transfer possession of, convey, assign, and transfer to Grantee any and all rights of ownership, occupation, use and enjoyment recognized or purported to be recognized by any governmental entity in said property and (b) to transfer, convey, and assign to Grantee any and all claims that Grantor may have or claim to have in or to said property

immunity from state taxation. It is precisely because title to land is held by Indian tribes that Congress intervened to prevent states and others from alienating that land without federal approval.^{2/}

Congress codified the immunity of Indian tribes from state taxation in those statutes in which it provided certain states, including Minnesota and *Amicus* State of New York, with limited jurisdiction over Indians. 25 U.S.C. § 233 and 28 U.S.C. § 1360. In doing so, Congress expressly withheld authorization from these states to tax Indian property, and that restriction was not limited to trust land. Section 233 of Title 25, for example, grants New York State courts civil jurisdiction over Indians, but provides that

nothing herein contained shall be construed as subjecting the lands within any Indian reservation in the State of New York to taxation for State or local purposes, nor as subjecting any such lands . . . to execution on any judgment rendered in the State courts, except in the enforcement of a judgment in a suit by one tribal member against another in the matter of the use or possession of land

25 U.S.C. § 233. This proviso to Section 233 specifically prohibits taxation of Indian reservation lands by the State of New York. Cf. *Bryan v. Itasca County*, 426 U.S. 373, 391 (1976) (similar provision in 28 U.S.C. § 1360 (P.L. 280) held to withhold federal authorization from Minnesota to tax Indian property). In apparent recognition of federal law, the State of New York's own law exempts tribal reservation land from state and local property taxes, N.Y. Real Prop.

^{2/} In 1790, when Congress first enacted the Nonintercourse Act, the only Indian lands were those titled to Indians and Indian tribes. 1 Stat. 137; *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974). Federal trust land status did not then exist.

Tax § 454 (McKinney 1984 & Supp. 1997). All land held by the Oneida Nation in New York is reservation land, pursuant to the Treaty of Canandaigua. See, e.g., *Oneida II*, 470 U.S. at 231-33; *Mattz v. Arnett*, 412 U.S. 481, 504-05 (1973) (reservation established by Congress is established until Congress declares otherwise).

Indian tribes are not under any obligation to record, or to acknowledge recordation of, title to their land with state or local governments. The fact that some may choose to do so, for commercial or other reasons, does not make their land taxable. The only reason for the Oneida Nation to record title to its reservation land among state land records is to clear the errors created by the previous illegal recordations of state law title by non-Indians.

Because the intent of Congress is determinative, the decision of the Court of Appeals for the Eighth Circuit should be affirmed. The seminal rule requiring an unmistakably clear statutory expression of Congressional consent to allow state taxation of Indian land should not be subject to exception.

CONCLUSION

The Oneida Nation respectfully requests this Court to adhere to its *per se* rule against state taxation of Indian tribes absent an unmistakably clear statutory expression of Congressional consent to permit state taxation, and to hold that such an intention was not expressed in Sections 4 and 5 of the Nelson Act.

Respectfully submitted,

William W. Taylor, III
Counsel of Record
Michael R. Smith
Eleanor H. Smith

ZUCKERMAN, SPAEDER, GOLDSTEIN,
TAYLOR & KOLKER, L.L.P.

1201 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 778-1800

Attorneys for *Amicus Curiae*
Oneida Indian Nation of New York

Dated: January 20, 1998

No. 97-174

FILED

JAN 20 1998

BE THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CASS COUNTY, *et al.*,
v. *Petitioners,*

LEECH LAKE BAND OF CHIPPEWA INDIANS,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF OF THE HOOPA VALLEY TRIBE,
THE NEZ PERCE TRIBE,
THE QUINAULT INDIAN NATION, AND
THE SPOKANE TRIBE OF INDIANS
AS *AMICI CURIAE*
IN SUPPORT OF RESPONDENT

MICHAEL J. WAHOSKE
Counsel of Record
DORSEY & WHITNEY LLP
Pillabury Center South
220 South Sixth Street
Minneapolis, MN 55402
(612) 340-8755
Counsel for Amici Curiae

32 pgs

QUESTION PRESENTED

Whether the mere fact that land owned by an Indian tribe within its reservation is freely alienable evidences clear congressional intent to grant jurisdiction to states and their political subdivisions to tax that land.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
INTERESTS OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. CONGRESSIONAL AUTHORIZATION OF STATE TAXATION ON RESERVATION LANDS OWNED BY INDIAN TRIBES MUST BE EXPRESS OR EXPLICIT	5
A. Cases Prior to <i>Yakima</i> Consistently Required Explicit Congressional Intent to Allow State Taxation in Indian Country	5
B. The Court's Indian Tax Jurisprudence Since <i>Yakima</i> Confirms the Necessity of Express Congressional Intent	9
II. DIFFERING LAND ALIENATION PROVI- SIONS IN INDIVIDUAL ALLOTMENT STAT- UTES LACK THE UNMISTAKABLY CLEAR INTENT TO TAX TRIBAL LANDHOLDERS FOUND BY THIS COURT IN SECTIONS 5 AND 6 OF THE GAA	11
A. Indian Land Alienation Occurred Through a Number of Allotment Statutes, Not Only Sec- tions 5 and 6 of the GAA	11
B. The Taxability of Reservation Lands Alien- ated Under Statutes Other Than Sections 5 and 6 of the GAA Is Not Defined by the Alienation Provisions Set Forth in Sections 5 and 6 of the GAA	14

TABLE OF CONTENTS—Continued

	Page
C. The Various Allotment Laws Contain Taxation Provisions That Differ From Those Found in the GAA	15
III. ADOPTION OF CASS COUNTY'S RULE THAT ALIENABILITY EQUALS TAXABILITY WOULD SUBSTANTIALLY THWART THE INTENT OF CONGRESS AND FRUSTRATE THE ABILITY OF THE EXECUTIVE BRANCH TO IMPLEMENT THE INDIAN REORGANIZATION ACT OF 1934	16
A. The Assimilation and Allotment Policies of the 19th Century Envisioned the End of Tribal Autonomy	17
B. Congress Passed the IRA in Recognition of the Failure of the Assimilation and Allotment Policies, and Intended in the IRA That Tribes Regain Land To Be Placed Into Trust	18
C. Adoption of the Rule Sought by Cass County Would Unduly Burden the IRA Fee to Trust Process and Unlawfully Place the Burden of the Tax on Indian Tribes	19
1. The fee to trust process established under the IRA is already overly-attenuated.....	19
2. If the "alienability equals taxability" rule is adopted, tribes could risk post-purchase loss of land before trust status is granted..	23
CONCLUSION	24

TABLE OF AUTHORITIES

CASES	Page
<i>Appeal of Municipality of Penn Hills</i> , 519 A.2d 1090 (Pa. Cmwlth. 1987), <i>aff'd</i> , 546 A.2d 50 (Penn. 1988)	10
<i>Bryan v. Itasca County</i> , 426 U.S. 373 (1976)	7, 8
<i>California v. Cabazon Band of Mission Indians</i> , 480 U.S. 202 (1987)	6
<i>Cass County, et al. v. Leech Lake Band of Chippewa Indians</i> , 108 F.3d 820 (8th Cir. 1997)	2, 14
<i>Coulter v. Gough</i> , 454 P.2d 969 (N.M. 1969)	10
<i>County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation</i> , 502 U.S. 251 (1992)	2, 5, 9, 10
<i>Dillman v. Foster</i> , 656 P.2d 974 (Utah 1982)	10
<i>Garcia v. Santa Clara County</i> , 151 Cal. Rptr. 80 (Cal. App. 1978)	10
<i>Kennerly v. District Court</i> , 400 U.S. 423 (1971)	7
<i>Lummi Indian Tribe v. Whatcom County</i> , 5 F.3d 1355 (9th Cir. 1993)	17
<i>Mattz v. Arnett</i> , 412 U.S. 481 (1973)	17, 18
<i>McClanahan v. State Tax Comm'n of Arizona</i> , 411 U.S. 164 (1973)	6, 7
<i>Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation</i> , 425 U.S. 463 (1976)	8
<i>Montana v. Blackfeet Tribe</i> , 471 U.S. 759 (1985)	5, 6
<i>New Mexico v. Mescalero Apache Tribe</i> , 462 U.S. 324 (1983)	19
<i>Oklahoma Tax Commission v. Chickasaw Nation</i> , 515 U.S. 450 (1995)	9
<i>Oklahoma Tax Commission v. Citizen Band Pottawatomie Indian Tribe of Oklahoma</i> , 498 U.S. 505 (1991)	8
<i>Oklahoma Tax Commission v. Sac and Fox Nation</i> , 508 U.S. 114 (1993)	10, 11
<i>Solem v. Bartlett</i> , 465 U.S. 463 (1984)	13, 17, 18
<i>United States v. Kopp</i> , 110 F. 160 (D. Wash. 1901)	12, 14
<i>United States ex rel. Saginaw Chippewa Indian Tribe v. Michigan</i> , 106 F.3d 130 (6th Cir. 1997), <i>petition for cert. filed</i> , 66 U.S.L.W. 3085 (June 30, 1997) (No. 97-14)	12, 14

TABLE OF AUTHORITIES—Continued

	Page
<i>Washington v. Confederated Tribes of Colville Indian Reservation</i> , 447 U.S. 134 (1980)	8
<i>White Mountain Apache Tribe v. Bracker</i> , 448 U.S. 136 (1980)	8, 19
<i>Witt v. United States</i> , 681 F.2d 1144 (9th Cir. 1982)	12
<i>Yellowstone County v. Pease</i> , 96 F.3d 1169 (9th Cir. 1996), <i>cert. denied</i> , 117 S.Ct. 1691 (1997)	14
CONSTITUTION, STATUTES, TREATIES AND RULES	
18 U.S.C. § 1151	3
25 U.S.C. § 231	7
25 U.S.C. § 331	14
25 U.S.C. § 339	12
25 U.S.C. § 348	13
25 U.S.C. § 357	16
25 U.S.C. § 372	16
25 U.S.C. § 373	16
25 U.S.C. § 378	16
25 U.S.C. § 379	16
25 U.S.C. § 391a	16
25 U.S.C. § 398	6, 7
25 U.S.C. § 404	16
25 U.S.C. § 405	16
25 U.S.C. § 409a	15
25 U.S.C. § 412a	15
25 U.S.C. § 461	18
25 U.S.C. § 463	18, 19
25 U.S.C. § 465	15, 18
25 U.S.C. § 487(c)	15
25 U.S.C. § 501	15
25 U.S.C. § 955	15
25 U.S.C. § 1322	7
25 U.S.C. § 1324	7
28 U.S.C. § 1360	8
25 C.F.R. Part 151	19, 22, 23, 24
Pub. L. 280, § 4, 67 Stat. 589, <i>codified at</i> 28 U.S.C. § 1360	8
Act of Mar. 3, 1817, ch. 88, § 1, 3 Stat. 380	12

TABLE OF AUTHORITIES—Continued

	Page
Act of Mar. 3, 1860, ch. 127, § 4, 13 Stat., pt. 2 (Public Acts 541 (Stockbridge-Munsees)	15
Act of Mar. 3, 1873, ch. 332, § 3, 17 Stat. 631 (Miamis)	15
Act of June 15, 1880, ch. 223, § 4, 21 Stat. 199 (Utes)	15
Act of Jan. 18, 1881, ch. 23 § 5, 21 Stat. 315 (Winnebagoes)	15
Act of Apr. 11, 1882, ch. 74, § 1, 22 Stat. 42 (Crows)	15
Act of June 28, 1898, ch. 517, § 29, 30 Stat. 495	15
Act of July 1, 1898, ch. 542, 30 Stat. 567 (Seminoles)	15
Act of Mar. 1, 1901, ch. 676, para. 7, 31 Stat. 861 (Creeks)	15
Act of June 30, 1902, ch. 1323, para. 16, 32 Stat. 500 (Creeks)	15
Act of July 1, 1902, ch. 1375, § 13, 32 Stat. 716 (Cherokees)	15
Act of June 28, 1906, ch. 3572, § 2, 34 Stat. 539 (Osages)	15
Act of May 29, 1908	13
Act of May 29, 1924, ch. 210, 43 Stat. 244	5
Act of Mar. 2, 1931, ch. 374, 46 Stat. 1471 (codified as amended at 25 U.S.C. § 409a)	15
Act of June 20, 1936, ch. 622, 49 Stat. 1542 (codified as amended at 25 U.S.C. § 412a)	15
Act of June 26, 1936, ch. 831, § 1, 49 Stat. 1967 (codified at 25 U.S.C. § 501)	15
Buck Act, 4 U.S.C. § 105	7
Crow Allotment Act of 1920, 41 Stat. 751	14
General Allotment Act of February 8, 1887, ch. 119, 24 Stat. 388 (1887)	<i>passim</i>
Hayden-Cartwright Act, 4 U.S.C. § 104	9
Indian Mineral Leasing Act of 1938	5, 6
Indian Nonintercourse Act, 25 U.S.C. § 177	3
Indian Reorganization Act, 48 Stat. 984, amended and codified as 25 U.S.C. §§ 461 <i>et seq.</i>	4, 18, 19

TABLE OF AUTHORITIES—Continued

	Page
Nelson Act of 1889, ch. 24, 25 Stat. 642 (1889).....	13
Treaty with the Chickasaws, Sept. 20, 1816, 7 Stat. 150	12
Treaty with the Chippewas, July 16, 1859, art. 1, 12 Stat. 1105	16
Treaty with the Creeks, Aug. 9, 1814, 7 Stat. 120....	12
Treaty with the Miamies, Oct. 6, 1818, 7 Stat. 189..	12
Treaty with the Nez Percés, June 9, 1863, art. 3, 14 Stat. 647	16
Treaty with the Omahas, Mar. 6, 1865, art. 4, 14 Stat 667	16
Treaty with the Piankishaws, Dec. 30, 1805, 7 Stat. 100	12
Treaty with the Winnebagoes, Apr. 15, 1859, art. 1, 12 Stat. 1101	16
Treaty with the Wyandots, Seneca, Delawares, Shawanese, Potawatomees, Ottawas, and Chippeways, Sept. 29, 1817, 7 Stat. 160	12
MISCELLANEOUS	
BIA-77, Justification for the Bureau of Indian Affairs Fiscal Year 1998 Budget Request to Congress	21
Bureau of Indian Affairs "Corrected Fact Sheet," Division of Real Estate Services, June 25, 1997..	20
Felix S. Cohen, <i>Handbook of Federal Indian Law</i> (1982 ed.)	12, 15-17
Letter from the Deputy Commissioner of Indian Affairs to Ernest J. Istook, Jr. dated July 16, 1997	20
D. Otis, <i>The Dawes Act and the Allotment of Indian Lands</i> 428-89 (F. Prucha, Ed., University of Oklahoma Press, 1973)	17
Monroe E. Price, <i>Law and the American Indian</i> 546 (1973)	14
Judith V. Royster, <i>The Legacy of Allotment</i> , 27 Ariz. St. L.J. 1 (1995)	13
S. Rep. No. 1080, 73d Cong., 2d Sess. 2 (1934).....	19

IN THE
Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-174

CASS COUNTY, *et al.*,
v. *Petitioners,*

LEECH LAKE BAND OF CHIPPEWA INDIANS,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF OF THE HOOPA VALLEY TRIBE,
THE NEZ PERCE TRIBE,
THE QUINULT INDIAN NATION, AND
THE SPOKANE TRIBE OF INDIANS
AS *AMICI CURIAE*
IN SUPPORT OF RESPONDENT

INTERESTS OF THE *AMICI CURIAE*

Amici are four federally recognized Indian tribes that have a compelling interest in the determination of the question presented to this Court: whether the mere fact that land owned by an Indian tribe within its reservation is freely alienable evidences clear congressional intent to grant jurisdiction to states and their political subdivisions to tax that land.¹ A reversal by this Court of the decision

¹ The parties have consented to the filing of this brief *amicus curiae*. Letters of consent have been filed with the Clerk of Court. Pursuant to Rule 37.6, amici state that no counsel for a party has

of the Court of Appeals for the Eighth Circuit in *Cass County, et al. v. Leech Lake Band of Chippewa Indians*, 108 F.3d 820 (8th Cir. 1997), would have a significant detrimental impact on amici.

Amici are the Hoopa Valley Tribe, the Nez Perce Tribe, the Quinault Indian Nation and the Spokane Tribe of Indians. Amici all own property in fee within the boundaries of their respective reservations, property which was allotted under various federal statutes and/or treaties in the 19th Century and that has subsequently been reacquired by amici. Petitioner Cass County contends that state and local governments can tax such property merely by showing that the reservation land is freely alienable by the tribal owner and without regard to the statute or treaty under which the property was originally conveyed. Cass County's position, however, is in direct conflict with this Court's "consistent practice of declining to find that Congress has authorized state taxation unless it has made its intention to do so unmistakably clear." *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 257 (1992) (internal quotation marks omitted). The Court of Appeals for the Eighth Circuit correctly ruled in this case that Congress has never explicitly granted general jurisdiction to states or their subdivisions to tax reservation lands owned by tribal governments if those lands were not allotted to individual Indians pursuant to the General Allotment Act of February 8, 1887, ch. 119, 24 Stat. 388 (1887) ("GAA"). Resp. App. at A-9-A-15. Reversal of that decision would harm amici and other similarly situated tribes by permitting the taxation of reservation land restored to tribal possession, and by unduly burdening the fee to trust process which Congress intended in part to repair the damage of the allotment era.

authored this brief in whole or in part, and that no person or entity other than the amici, their members, or their counsel, has made a monetary contribution to the preparation or submission of the brief.

Amici are gravely concerned over Cass County's attempt to persuade this Court to adopt a new rule of law that directly contradicts this Court's previous cases and federal policy. Amici support Respondent Leech Lake Band of Chippewa Indians ("Leech Lake" or "Respondent") in seeking affirmance of that portion of the Eighth Circuit's decision before this Court.

SUMMARY OF ARGUMENT

Petitioner Cass County proposes a new rule of law to control the outcome of this case that would replace well-settled precedent. This Court has long recognized that state taxation of land owned by Indians and Indian tribes in Indian Country² is allowed only where Congress has made its intention to do so unmistakably clear. Cass County concedes it cannot meet this standard, and instead urges this Court to create a new rule that "alienability equals taxability," under which states and their political subdivisions can tax all fee land in Indian Country so long as the land is "freely alienable."³ As

² Amici use the terms "Indian Country" and "reservation land" where appropriate throughout this brief. Reservations, which are at issue here, are a subset of "Indian Country" as defined in 18 U.S.C. § 1151 (1994):

... (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

³ As demonstrated in Respondent's brief, there is serious debate as to whether tribally owned land in Indian Country is "freely alienable," due to the constraints of the Indian Nonintercourse Act, 25 U.S.C. § 177.

Respondent Leech Lake demonstrates in its brief, the "unmistakably clear intent" rule should determine whether Cass County can tax reservation lands owned by Indian tribes. Amici support this argument, and demonstrate herein that this Court has consistently required an "express" or "explicit" statement of congressional intent.

In addition, the Court should reject Cass County's proposed general rule that "alienability equals taxability" because "alienability" cannot be determined generally by reference to Sections 5 and 6 of the General Allotment Act. Indian land was alienated through a number of individually negotiated allotment statutes and treaties, not only through Sections 5 and 6 of the GAA. These other statutes and treaties differ from the GAA; some have no provisions regarding taxation, some do, and all are separate and distinct from the GAA in their particular wording and history.

Finally, amici demonstrate that adoption of Cass County's "alienability equals taxability" rule would substantially thwart the intent of Congress and frustrate the ability of the Executive Branch to implement the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 *et seq.* (1994) ("IRA"). Congress passed the Indian Reorganization Act in recognition of the miserable failure of the assimilation and allotment policies of the 19th Century, and intended in the IRA that tribes and/or the federal government purchase land and that such land be taken into trust. Adoption of the rule sought by Cass County would unduly burden the fee to trust transfer process envisioned by the IRA, and would wrongfully place the burden of the tax on Indian tribes. Statistics from the Bureau of Indian Affairs demonstrate that the fee to trust process is already overly-attenuated and that adoption of the proposed "alienability equals taxability" rule would likely result in fewer fee to trust transfers.

ARGUMENT

I. CONGRESSIONAL AUTHORIZATION OF STATE TAXATION ON RESERVATION LANDS OWNED BY INDIAN TRIBES MUST BE EXPRESS OR EXPLICIT.

The Respondent's Brief ably demonstrates that in *Yakima* this Court recognized the longstanding rule that state taxation of Indians and Indian land in Indian Country is allowed only where Congress has made "its intention to do so unmistakably clear." *Yakima*, 502 U.S. at 258 (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985)). This Court in *Yakima* allowed taxation only after it accepted Yakima County's "threshold assessment" that Section 6 of the GAA, as amended, provided the necessary "express authority" for taxation by the state of the lands there at issue. *Id.*

This Court has consistently required an "express" or "explicit" statement of congressional intent as a condition of state taxation of Indian tribes, tribal members, or reservation land in Indian Country. A survey of this Court's cases, before and after *Yakima*, confirms the consistency of that requirement, which should be applied here.

A. Cases Prior to *Yakima* Consistently Required Explicit Congressional Intent to Allow State Taxation in Indian Country.

The *Yakima* Court cited two examples of the rule that congressional intent to permit state taxation of tribally-owned land within Indian Country must be "unmistakably clear." In *Blackfeet Tribe*, the Court held that state taxes on oil and gas leases signed with tribes after the passage of the Indian Mineral Leasing Act of 1938 were impermissible. 471 U.S. at 768. The 1938 Act was enacted subsequent to a 1924 Act which provided that such leases "may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands." *Id.* at 763 (quoting Act of May 29, 1924, ch.

210, 43 Stat. 244, 25 U.S.C. § 398). After noting that congressional intent to allow state taxation of Indians or their land must be "unmistakably clear," the *Blackfeet Tribe* Court found that the 1924 Act contained "such an explicit authorization," *id.* at 765 (emphasis added), but went on to hold that the 1938 Act did not. In fact, the silence of the 1938 Act on the issue, coupled with the canons of construction favoring Indians, was sufficient to effect a repeal of the 1924 taxation language with respect to leases after 1938. *Id.* at 765-66.

The second citation in *Yakima* to the "unmistakably clear" rule was to *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). While the issue of taxation was not before the *Cabazon* Court, the majority set out a lengthy footnote to emphasize that although many tribal/state issues are resolved by balancing the respective interests, state taxation of Indians is precluded by a *per se* rule absent "unmistakably clear" congressional consent. 480 U.S. at 215 n.17. The Court explained, "[w]e have recognized that the federal tradition of Indian immunity from state taxation is very strong and that the state interest in taxation is correspondingly weak." *Id.*

Tracing the evolution of this Court's Indian tax jurisprudence back even further leads to the Court's unanimous decision in *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164 (1973). Quoting a Department of the Interior publication on federal Indian law, the *McClanahan* Court adopted the following summary of the "relevant law":

State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply. It follows that Indians and Indian property on an Indian reservation are not subject to State taxation except by virtue of *express authority* conferred upon the State by act of Congress.

Id. at 170-71 (citation omitted, emphasis added). Analyzing the applicable treaties and statutes, the Court concluded that imposition of the income tax which Arizona sought to impose in that case was impermissible. The Court observed that other legislation proved that Congress must have "assumed that the States lacked the power to impose the taxes without *special authorization*." *Id.* at 177 (emphasis added).⁴

In *Bryan v. Itasca County*, 426 U.S. 373 (1976), the Court considered a question reserved in *McClanahan*: whether the grant to some states of civil jurisdiction over Indians on Indian reservations by § 4 of Pub. L. 83-280,

⁴ The Court referred to two acts of Congress of general application as examples of congressional understanding that "reservation Indians" are presumably not taxable. First, it cited the Buck Act, 4 U.S.C. § 105 *et seq.*, which governs taxation in federal areas. After discussing specific provisions, the Court explained that

it should be obvious that Congress would not have jealously protected the immunity of reservation Indians from state income taxes had it thought that the States had residual power to impose such taxes in any event. Similarly, narrower statutes authorizing States to assert tax jurisdiction over reservations in special situations are explicable only if Congress assumed that the States lacked the power to impose the taxes without *special authorization*.

McClanahan, 411 U.S. at 177 (footnotes omitted). The "narrower statutes" to which the Court referred included 25 U.S.C. § 398 (congressional authorization for states to tax mineral production on unallotted tribal lands); the Court also made a comparison to 18 U.S.C. § 1161 (state liquor laws may be applicable within reservations), and to 25 U.S.C. § 231 (state health and education laws may be applicable within reservations). *See* 411 U.S. at 177 n.16. Second, the Court observed that 25 U.S.C. §§ 1322 and 1324 require tribal consent before a state can assume civil jurisdiction in Indian Country. "[W]e cannot believe that Congress would have required the consent of the Indians affected and the amendment of those state constitutions which prohibit the assumption of jurisdiction if the States were free to accomplish the same goal unilaterally by simple legislative enactment. *See Kennerly v. District Court*, 400 U.S. 423 (1971)." *McClanahan*, 411 U.S. at 178.

67 Stat. 589, codified at 28 U.S.C. § 1360 ("Pub. L. 280"), also conferred the power to tax. Pub. L. 280 contains no specific reference to taxation. While examining the legislative history of Pub. L. 280, the *Bryan* Court observed "the total absence of mention or discussion regarding a congressional intent to confer upon the States an authority to tax Indians or Indian property on reservations." *Id.* at 381. After analyzing the history and structure of the statute, the Court explained that the congressional policy in more recent, related legislation also supported the conclusion of nontaxability. *Id.* at 384-86. The Court stated that Congress knows how to write explicit language allowing taxation of reservation Indians and land, cited examples, and therefore concluded, "if Congress in enacting Pub. L. 280 had intended to confer upon the States general civil regulatory powers over reservation Indians, it would have *expressly* said so." *Id.* at 390 (emphasis added). The Court sought an express statement of congressional intent, instead found silence, and therefore held that taxation of Indians had not been authorized.

Thus, while some decisions of this Court allow state taxation of sales of goods to non-tribal members living within Indian reservations,⁵ this Court has not allowed the taxation of a tribe or tribal members located on a reservation and engaged in on-reservation activity absent an express authorization by Congress. *See Colville*, 447 U.S. at 162-64 (motor vehicle tax on members invalid); *Bryan*, 426 U.S. at 393 (personal property tax on mobile home invalid); *Moe*, 425 U.S. 480-81 (various taxes on tribal members invalid). *Cf. White Mountain Apache*

⁵ See, e.g., *Oklahoma Tax Comm. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 512 (1991) (cigarette taxes); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 158-60 (1980) (same); *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 483 (1976) (same).

Tribe v. Bracker, 448 U.S. 136 (1980) (state taxation of nonmembers' on-reservation logging activities preempted because overly burdensome on federal Indian logging policy).

B. The Court's Indian Tax Jurisprudence Since *Yakima* Confirms the Necessity of Express Congressional Intent.

The Indian tax cases decided by this Court since *Yakima* support the conclusion that congressional intent to allow state taxation must be explicit. In *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995), the Court considered a motor fuel tax which Oklahoma attempted to impose on tribal retailers. The State argued for the first time to this Court that the Hayden-Cartwright Act, 4 U.S.C. § 104, authorized taxation of motor fuel sales on "United States military or other reservations." Invoking the rule that issues not presented prior to briefing on the merits will only rarely be heard, the Court refused to consider the statutory claim, 515 U.S. at 456-57, and put the question before it in these terms: "[a]ssuming, then, that Congress has not *expressly authorized* the imposition of Oklahoma's fuels tax on fuel sold by the Tribe, we must decide if the State's exaction is nonetheless permitted." *Id.* at 457 (emphasis added). Absent express authorization, the Court determined that the tax would only be allowed if the legal incidence fell not on the tribe or tribal members but on non-Indians. *Id.* at 458-59. As the incidence of the fuel tax at issue was held to fall on tribal retailers, the categorical approach and the lack of "express authorization" led to the conclusion that the fuel tax was impermissible. *Id.* at 461-62.⁶

⁶ As described in *Chickasaw*, where the legal incidence of a tax falls on a tribe or tribal members in Indian country, "absent a cession of jurisdiction or other federal statutes permitting it, we have held, a State is without power to tax reservation lands and reservation Indians." 515 U.S. at 461 (quoting *Yakima*). Unlike the cases in which the Court has previously considered where the

Another attempt by Oklahoma to impose income taxes and motor vehicle taxes on tribal members also confirms the express congressional authorization necessary to make such taxes permissible in Indian Country. In *Oklahoma Tax Comm. v. Sac and Fox Nation*, 508 U.S. 114 (1993), this Court concluded that a motor vehicle tax was not tailored to cover only off-reservation use and remanded the matter to determine whether the tribal members potentially subject to the income tax resided in Indian Country. For present purposes, the conclusion to the unanimous opinion is sufficient to state the rule:

Absent *explicit congressional direction* to the contrary, we *presume* against a State's having jurisdiction to tax within Indian country, whether the particular territory consists of a formal or informal res-

legal incidence falls, there is only one potential taxpayer of a property tax. As a practical matter, therefore, the incidence of a real property tax falls on the owner of the land, and it is the owner who will lose the property through a tax sale if the taxes are not paid.

A formalistic application of the incidence test could conceivably suggest that the incidence falls on the land itself, as may in fact be implied by *Yakima*. 502 U.S. at 266. Such a result, however, would not only be highly formalistic, it would also create another level of complexity in Indian taxation. In some states, including Washington, property taxes attach solely to the land. *See id.* In others, property taxes also create personal liability for the owner. *See, e.g., Appeal of Municipality of Penn Hills*, 519 A.2d 1090, 1091 (Pa. Cmwlth. 1987), *aff'd*, 546 A.2d 50 (Penn. 1988); *Dillman v. Foster*, 656 P.2d 974, 978 (Utah 1982); *Coulter v. Gough*, 454 P.2d 969, 970 (N.M. 1969).

In at least one state, the situation is even more complex. In California, property is considered "secured" so long as the state can, if necessary, foreclose on the property itself if taxes go unpaid. Owners of property on the secured roll are not personally liable for property taxes. *Garcia v. Santa Clara County*, 151 Cal. Rptr. 80 (Cal. App. 1978). But if the land is transferred into trust or a tax lien otherwise becomes unenforceable or disappears, the land is transferred to the "unsecured roll," and the taxpayer becomes personally liable. *Id.*

ervation, allotted lands, or dependent Indian communities.

Id. at 128 (emphasis added).

II. DIFFERING LAND ALIENATION PROVISIONS IN INDIVIDUAL ALLOTMENT STATUTES LACK THE UNMISTAKABLY CLEAR INTENT TO TAX TRIBAL LANDHOLDERS FOUND BY THIS COURT IN SECTIONS 5 AND 6 OF THE GAA.

Cass County's "alienability equals taxability" argument depends upon the "alienability" of tribally owned reservation land being uniform, evidencing a uniform congressional intent. More particularly, Cass County's theory requires that "alienability" be defined by Sections 5 and 6 of the GAA, as this is where this Court found an "unmistakably clear congressional intent" that land alienated thereunder could be subject to state tax. The historical facts of Indian land alienation, however, render the concept of "alienability" unsuceptible to a uniform definition: Indian land alienation occurred through a great number of allotment statutes, not only the GAA. Therefore, the consequences of GAA alienability cannot be imposed upon all Indian land alienation. Instead, to apply the "unmistakably clear intent" requirement fairly and properly, an individual assessment of each statute under which land alienation occurred is required.

A. Indian Land Alienation Occurred Through a Number of Allotment Statutes, Not Only Sections 5 and 6 of the GAA.

The alienation of Indian land was accomplished through a number of statutes in addition to the GAA. Allotment agreements with tribes existed before the GAA was enacted; they existed, in fact, prior to the founding of the Republic. "The allotment concept was not new; Indian lands had been allotted as early as 1633 and the allotment concept had been developing and gaining in popularity

for some time." Felix S. Cohen, *Handbook of Federal Indian Law* 129 (1982 ed.) (footnotes omitted) (hereafter "Cohen"). Moreover, these early allotment agreements did not have uniform alienation terms; the allotments "were commonly known as 'reservations,' and various forms of tenure were imposed upon them. Some lands were held in trust, others granted in fee simple." *Id.* (citing Treaty with the Chickasaws, Sept. 20, 1816, 7 Stat. 150; Act of Mar. 3, 1817, ch. 88, § 1, 3 Stat. 380, 380-81 (implementing Treaty with the Creeks, Aug. 9, 1814, 7 Stat. 120); Treaty with the Miamies, Oct. 6, 1818, 7 Stat. 189; Treaty with the Wyandots, Seneca, Delawares, Shawanese, Potawatomees, Ottawas, and Chippeways, Sept. 29, 1817, 7 Stat. 160; Treaty with the Piankishaws, Dec. 30, 1805, 7 Stat. 100). The GAA did not alter the substantive rights of Indian land owners under these agreements. *United States ex rel. Saginaw Chippewa Indian Tribe v. Michigan*, 106 F.3d 130, 135 (6th Cir.) (citing *United States v. Kopp*, 110 F. 160, 165-66 (D. Wash. 1901), *petition for cert. filed*, 66 U.S.L.W. 3085 (June 30, 1997) (No. 97-14)).

In addition to the allotment statutes and treaties entered into prior to enactment of the GAA, the GAA specifically excluded certain other allotment statutes from its provisions. Section 8 of the GAA (25 U.S.C. § 339, as amended) noted that "[t]he provision of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miamies and Peorias, and Sacs and Foxes, in Oklahoma, nor to any of the reservations of the Seneca Nation of New York Indians in the State of New York, nor to that strip of territory in the State of Nebraska adjoining the Sioux Nation on the south added by Executive order." Separate allotment statutes were enacted for these tribes, *Witt v. United States*, 681 F.2d 1144, 1147 (9th Cir. 1982), and they "included specific tax exemption provisions." Cohen at 394 n.36.

As a result of tribe-by-tribe negotiations, numerous other allotment statutes specific to individual tribes were enacted to alienate what the United States deemed to be "surplus" Indian land. The GAA specifically provided for such separately negotiated agreements in section 5 (25 U.S.C. § 348, as amended):

[I]t shall be lawful for the Secretary of the Interior to negotiate with such Indian tribes for the purchase and release by said tribe, in conformity with the Treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress[.]

Such land was not alienated under the terms of sections 5 and 6 of the GAA but rather under individually negotiated agreements with each tribe. *See Solem v. Bartlett*, 465 U.S. 463, 467 (1984) ("Initially, Congress legislated its Indian allotment program on a national scale . . . but at the time of the Act of May 29, 1908, Congress was dealing with the surplus land question on a reservation-by-reservation basis, with each surplus land act employing its own statutory language, the product of a unique set of tribal negotiation and legislative compromise.") (footnote omitted). *See also* Judith V. Royster, *The Legacy of Allotment*, 27 Ariz. St. L.J. 1, 29 (1995) ("While the GAA authorized the sale and homesteading of the surplus lands, the program was implemented through specific lands acts for particular reservations.").

Indeed, the Nelson Act at issue in this case is an example of a negotiated agreement that only partly incorporates provisions of the GAA. As recognized by the Eighth Circuit, "[f]or the Leech Lake Band and other

Minnesota Chippewa tribes, the allotment policy was carried out through the Nelson Act of 1889, ch. 24, 25 Stat. 642 (1889), which partially incorporated the GAA. . . . The allotment of land to individual Indians . . . was done in conformity with the GAA. . . . The rest of the land was made available to the general public . . . under . . . the pine lands provisions [or] the Homestead Act" 108 F.3d at 823. *See, e.g., Yellowstone County v. Pease*, 96 F.3d 1169, 1171 (9th Cir. 1996) ("The property was allotted and patented in fee to Pease's father under the Crow Allotment Act of 1920, 41 Stat. 751."), *cert. denied*, 117 S.Ct. 1691 (1997). *See also* Monroe E. Price, *Law and the American Indian* 546 (1973) ("In 1890 the Commissioner reported, 'In numerous instances, where clearly desirable, Congress has by special legislation authorized negotiations with the Indians for portions of their reservations without waiting for the slower process of the general allotment law.'").

B. The Taxability of Reservation Lands Alienated Under Statutes Other Than Sections 5 and 6 of the GAA Is Not Defined by the Alienation Provisions Set Forth in Sections 5 and 6 of the GAA.

No provision of the GAA purports to govern all tribes or all other allotment statutes. The GAA merely empowers the President to make allotments under certain circumstances, such as for lands which "may be advantageously utilized for agricultural or grazing purposes." 25 U.S.C. § 331. GAA provisions simply do not "govern land grants that are not made pursuant to the Act." *Saginaw Chippewa*, 106 F.3d at 135; *see also United States v. Kopp*, 110 F. at 165-66 (holding that the GAA did not change the substantive rights of Indian land owners whose land was alienated according to agreements predating the GAA).

C. The Various Allotment Laws Contain Taxation Provisions That Differ From Those Found in the GAA.

Section 6 of the GAA, as amended, contains a provision explicitly providing for the taxation of Indian fee lands patented pursuant to that section. Another allotment statute, 25 U.S.C. § 379, contains a provision for the taxation of property alienated thereunder: "All allotted lands so alienated by the heirs of an Indian allottee and all land so patented to a white allottee shall thereupon be subject of taxation under the law of the State or Territory where the same is situated."

Other allotment acts, however, explicitly provide that the land alienated under those acts is not to be taxed. Cohen at 391 & n.17, 418 n.129 (citing Act of June 26, 1936, ch. 831, § 1, 49 Stat. 1967 (codified at 25 U.S.C. § 501); Act of June 20, 1936, ch. 622, 49 Stat. 1542 (codified as amended at 25 U.S.C. § 412a); Act of Mar. 2, 1931, ch. 374, 46 Stat. 1471 (codified as amended at 25 U.S.C. § 409a); Act of June 28, 1898, ch. 517, § 29, 30 Stat. 495, 507 ("shall be nontaxable"); 25 U.S.C. §§ 409a, 412a, 465, 487(c), 501, 955; Act of June 28, 1906, ch. 3572, § 2, 34 Stat. 539, 541 (Osages); Act of July 1, 1902, ch. 1375, § 13, 32 Stat. 716, 717 (Cherokees); Act of June 30, 1902, ch. 1323, para. 16, 32 Stat. 500, 503 (Creeks); Act of Mar 1, 1901, ch. 676, para. 7, 31 Stat. 861, 863 (Creeks); Act of July 1, 1898, ch. 542, 30 Stat. 567, 568 (Seminoles); Act of Apr. 11, 1882, ch. 74, § 1, 22 Stat. 42 (Crows); Act of Jan. 18, 1881, ch. 23, § 5, 21 Stat. 315, 317 (Winnebagos); Act of June 15, 1880, ch. 223, § 4, 21 Stat. 199, 204 (Utes); Act of Mar. 3, 1873, ch. 332, § 3, 17 Stat. 631, 632 (Miamis); Act of Mar. 3, 1865, ch. 127, § 4, 13 Stat., pt. 2 (Public Acts) 541, 562 (Stockbridge-Munsees).

In addition to these allotment statutes which clearly state that the alienated lands are not taxable, some treaties require that allotted land not be taxed. *See* Cohen at 418

& n.129 ("A number of treaties . . . have specified that allotments shall not be taxable.") (citing Treaty with the Omahas, Mar. 6, 1865, art. 4, 14 Stat. 667, 668; Treaty with the Nez Percés, June 9, 1863, art. 3, 14 Stat. 647, 649; Treaty with the Chippewas, July 16, 1859, art. 1, 12 Stat. 1105, 1107; Treaty with the Winnebagoes, Apr. 15, 1859, art. 1, 12 Stat. 1101, 1102).

Still other allotment statutes and treaties are silent with regard to the taxability of the alienated land. See Cohen at 410 n.54 (citing 25 U.S.C. §§ 357, 372, 373, 378, 379, 391a, 404, 405).

Consistent with the history of Indian law, alienation of Indian land was a complex process accomplished through a number of statutes and treaties, not only through sections 5 and 6 of the GAA. Many of these allotment statutes and treaty provisions addressed a single tribe's land as the result of individual negotiations between the United States and that tribe. It is no accident that the various alienation laws contained differing provisions concerning taxation of the alienated land. For these reasons, the requisite "unmistakably clear intent" for the taxation of land alienated under other allotment laws cannot be found in sections 5 and 6 of the GAA.

III. ADOPTION OF CASS COUNTY'S RULE THAT ALIENABILITY EQUALS TAXABILITY WOULD SUBSTANTIALLY THWART THE INTENT OF CONGRESS AND FRUSTRATE THE ABILITY OF THE EXECUTIVE BRANCH TO IMPLEMENT THE INDIAN REORGANIZATION ACT OF 1934.

Cass County would have the Court disregard its numerous prior holdings, extend *Yakima* beyond its limits, and hold that states can tax all fee land in Indian Country so long as the land is freely alienable, regardless of ownership and origin of the land, and regardless of whether there is unmistakably clear intent by Congress

for such land to be taxed.⁷ Adoption of Cass County's position not only would disregard the "unmistakably clear intent" rule, it would also create an obstacle for the proper and necessary implementation of current federal policy regarding the recapture of trust land lost by Indians and Indian tribes during the allotment period.

A. The Assimilation and Allotment Policies of the 19th Century Envisioned the End of Tribal Autonomy.

Allotment was an assimilationist policy that prevailed in the latter half of the 19th Century. Cohen at 127-43. The goal of allotment and assimilation was to absorb Indians into the mainstream of American life and to destroy the "savagery" created by tribal autonomy. *Id.* at 128-29. The GAA, passed in 1887, was enacted to further this goal, and was an attempt to develop a "new role" for Indians in American society. *Id.* at 130. Congress expected that shortly after passage of the GAA, the Indian reservation system would cease to exist.⁸ See *Solem v. Bartlett*, 465 U.S. at 468; see also *Mattz v. Arnett*, 412 U.S. 481, 496 (1973). The destruction of the tribal system was thought inevitable, and allotment was deemed necessary to the civilization of Indians and to their survival in the future. Cohen at 129-139.

⁷ "There is an appealing simplicity to the proposition that alienable land is taxable land. Unfortunately, federal Indian law does not have a simple history; no amount of wishing will give it a simple future."

Lummi Indian Tribe v. Whatcom County, 5 F.3d 1355, 1360 (9th Cir. 1993) (Beezer, J., dissenting).

⁸ Between 1887 and 1934, more than 90 million acres of land passed out of Indian ownership under the allotment policies of the United States following the end of the treaty-making period in 1871. Cohen at 138, citing D. Otis, *The Dawes Act and the Allotment of Indian Lands* (1973).

B. Congress Passed the IRA in Recognition of the Failure of the Assimilation and Allotment Policies, and Intended in the IRA That Tribes Regain Land To Be Placed Into Trust.

For several decades after passage of the GAA, federal policy was aimed at assimilating Indians into society and eliminating tribal autonomy. After it became apparent to Congress in the 1920's that the allotment and assimilation policies had not succeeded and could not succeed, Congress adopted a new policy, which is embodied in the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. §§ 461 *et seq.*

Through passage of the IRA, Congress recognized that its earlier policies of assimilation and allotment had failed. *Solem v. Bartlett*, 465 U.S. at 468 n.9. As this Court has noted, "the policy of allotment and sale of surplus reservation land was repudiated in 1934 by the Indian Reorganization Act, 48 Stat. 984, now amended and codified as 25 U.S.C. § 461 *et seq.*" *Mattz v. Arnett*, 412 U.S. at 496 n.18. While the issuance of allotments had been discontinued by administrative order prior to enactment of the IRA, Congress in the IRA expressly prohibited any further allotments and created a mechanism by which the Secretary of the Interior could restore lands to tribal ownership. 25 U.S.C. §§ 461, 463. Congress further authorized the Secretary, in his discretion, to acquire and transfer fee lands into trust on behalf of Indians and Indian tribes. 25 U.S.C. § 465.⁹

The IRA and its progeny demonstrate congressional intent to rebuild the tribal land base, in large part through the transfer of fee land within reservations to trust status. Reservation lands which had been deemed "surplus" by prior allotment and other acts were to be restored to the

⁹ Amici note that the lands at issue in this case, like the lands regained by amici, are lands held in fee as an interim step in the process of being transferred into trust pursuant to 25 U.S.C. § 465.

beneficial ownership of the tribes.¹⁰ Clearly, the unmistakable intent of Congress in 1934 was to reverse the allotment process and to begin to restore lands to trust status, wherein the United States hold the title for the benefit of the tribe. This Court also has recognized that the IRA was passed to fulfill "Congress' overriding goal of encouraging tribal self-sufficiency and economic development." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983). See also *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 143.

Congress recognized in the IRA that a land base, under tribal control, is the foundation of tribal vitality. The unique status of Indian-held lands is a central and indispensable pillar of federal Indian law and federal Indian policy. Further expansion of the taxation of Indian-owned fee lands on reservations would frustrate the congressional intent in the enactment of the IRA.

C. Adoption of the Rule Sought by Cass County Would Unduly Burden the IRA Fee to Trust Process and Unlawfully Place the Burden of the Tax on Indian Tribes.

1. The fee to trust process established under the IRA is already overly-attenuated.

The Department of Interior has established policies and procedures governing the acquisition of land by the United States in trust status for individual Indians and tribes. 25 C.F.R. Part 151. Authority for these policies and

¹⁰ 25 U.S.C. § 463. The Senate Committee explained this section as follows:

When allotment was carried out on various reservations, tracts of surplus or ceded land remained unallotted and were placed with the Land Office of the Department of the Interior for sale, the proceeds to be paid to the Indians. Some of these tracts remain unsold and by section 3 of the bill they are restored to tribal use.

S. Rep. No. 1080, 73d Cong., 2d Sess. 2 (1934).

procedures is principally found in the Indian Reorganization Act of 1934. Land may be put into trust for a tribe when the Secretary determines that "the acquisition of the land is necessary to facilitate tribal self-determination, economic development or Indian housing." 25 C.F.R. § 151.3(a)(3).

The Department of the Interior holds approximately 54 million acres of land in trust or restricted status for either Indian tribes or Indian individuals.¹¹ Since 1992, however, the amount of land being placed in trust has dropped precipitously. For the six year period from 1986 to 1991, 2,485,000 acres were placed into trust status, at an annual average rate of 414,166 acres per year.¹² From 1992 to 1996, only 215,000 acres were placed in trust, at an annual average rate of 55,000 acres per year, a seven-fold reduction in the amount of land being accepted into trust within one decade.¹³ The impact of this sudden and substantial reduction in fee-to-trust acquisitions is magnified by the fact that, in 1996 alone, 130,000 acres of Indian land were removed from trust status, resulting in a net decrease in trust acreage for that year.¹⁴

There is a growing backlog of pending applications from Indian tribes and individuals who have asked the Department of the Interior to transfer into trust status Indian lands held in fee. In 1997, the Department estimated there were approximately 1,570 pending applications for approximately 275,000 such acres.¹⁵ Yet, for fis-

¹¹ Bureau of Indian Affairs "Corrected Fact Sheet," Division of Real Estate Services, June 25, 1997 (copies of this document have been lodged with the Clerk).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* The Department estimates that the acreage taken into trust in 1996 was 55,000, the same rate for each of 1992, 1993, 1994 and 1995. *Id.*

¹⁵ July 16, 1997 letter to U.S. Representative Ernest J. Istook, Jr. from the Deputy Commissioner of Indian Affairs, Bureau of Indian Affairs, Department of the Interior, and report enclosed there-

cal 1998, the Bureau of Indian Affairs ("BIA") has proposed to continue to review the 1,570 pending applications at a pace of just 150 applications per year.¹⁶ In addition to the acreage included in pending applications, the Navajo Area Office, one of twelve such regional offices of the Bureau of Indian Affairs, reported in mid-1997 that there are an additional 480,000 acres which it considers likely to be the subject of "potential" applications.¹⁷

Amici each have applications pending with the Department for tribal fee lands to be accepted into trust status. As of mid-1997, amicus Nez Perce Tribe had ten applications pending for a total of approximately 14,200 acres, nearly half of which are within its Reservation. Some of the Nez Perce Tribe's applications have been pending with the Department of the Interior since February 1989. In addition, there are two pending applications filed by Indian individuals for approximately one acre of land each located on the Nez Perce Reservation.

As of mid-1997, the BIA reported that amicus Spokane Tribe of Indians had six applications pending for a total of approximately 1,210 acres, all of which are for lands within the Tribe's Reservation.¹⁸ One of the applications

with. ("Istook Report") (copies of this document have been lodged with the Clerk). According to the detail supplied to the Congress by the Bureau of Indian Affairs, approximately 675 of the applications were from individual Indians and approximately 900 of the applications were from Indian tribes. Approximately 1,300 of the applications are for fee land located within reservation boundaries.

¹⁶ "Major functions [of the BIA Real Estate Services branch] have annually required the review of . . . 150 land acquisition requests. . . ." BIA-77, Justification for the Bureau of Indian Affairs Fiscal Year 1998 Budget Request to Congress (copies of relevant portions of this document have been lodged with the Clerk).

¹⁷ *Id.* Another of the twelve regional offices, the Juneau Area Office, reported no applications pending.

¹⁸ Istook Report. Curiously, amicus Spokane Tribe of Indians' records show that there are in fact nine applications pending which cover 1,640 acres. Similarly, the BIA reported only seven pending

has been pending since December 1969; another since March 1981. In addition, there are 24 pending applications filed by Indian individuals for approximately 1,241 acres of land within the Tribe's Reservation. Four of these pending applications by Indian individuals were filed as long ago as April 1977. Amicus Spokane Tribe of Indians holds additional lands in fee within the Reservation for which it is preparing,¹⁹ but has not yet filed, applications to the Department of the Interior to place the land in trust under 25 C.F.R. § 151. The Spokane Tribe of Indians is also the beneficial owner of approximately 100,221 acres held in trust for it by the United States. An additional 29,614 acres are in restricted status as allotments within the Tribe's Reservation.

As of mid-1997, the BIA reported that amicus Quinault Indian Nation had seven applications pending for a total of approximately 3,594 acres, all of which are for lands located within the Nation's Reservation. One of the applications has been pending since February 1992. In addition, there are five pending applications filed by Indian individuals for less than one acre of land within the Quinault Indian Reservation. One of these pending applications by Indian individuals was filed as long ago as April 1990.

As of mid-1997, amicus Hoopa Valley Tribe had 42 applications pending for a total of approximately 474 acres, all of which are for lands located within the Tribe's Reservation. Forty of these applications have been pend-

applications filed by amicus Quinault Indian Nation, whose records show that an eighth application for over 10,000 acres is also currently before the BIA. The BIA thus failed to report nearly a quarter of the pending applications, and those omissions understated the total acres outstanding for the two amici by over 300 percent. Copies of the reports from amici Quinault Indian Nation and Spokane Tribe of Indians have been lodged with the Clerk.

¹⁹ An applicant must furnish title evidence to the Secretary meeting the *Standards For The Preparation of Title Evidence In Land Acquisitions by the United States*, issued by the U.S. Department of Justice. 25 C.F.R. § 151.13 (1997).

ing since 1993. In addition, there are 22 pending applications filed by Indian individuals for approximately 146 acres of land within the Hoopa Valley Reservation. All of these pending applications by Indian individuals were filed in 1993. The Reservation of amicus Hoopa Valley Tribe is comprised of 93,756 acres, 90,816 acres of which are held in trust for the Tribe. An additional 1,052 acres are allotted to tribal members. Approximately 2% of the Tribe's Reservation is held in fee, originating as allotted land to individual Indians which was subsequently alienated to non-Indians. The Tribe holds approximately 633 acres of the fee land within its Reservation, some of which are the subject of the pending applications, and for some of which it is preparing,²⁰ but has not yet filed, applications to the Department of the Interior to place the land in trust under 25 C.F.R. Part 151.

2. If the "alienability equals taxability" rule is adopted, tribes could risk post-purchase loss of land before trust status is granted.

Since 1992, some county assessors have been seeking to assess and collect *ad valorem* taxes on the fee lands held by tribal governments, notwithstanding the fact that the tribes have applications pending under 25 C.F.R. § 151 for the land to be accepted into trust status by the Department. If the Court adopts the "alienability equals taxability" rule sought by Cass County in this case, amici and other similarly situated tribes will be faced with mounting local property tax assessments on land they have reacquired and are actively seeking to place into trust status under an increasingly protracted Department of the Interior process. While the rule proposed by Cass County would not permit a state to tax land after it is accepted into trust under 25 C.F.R. Part 151, it would permit a state to burden such land with state taxation during the many intervening years it is held by a tribe while the trust status of the land is under application. This would raise

²⁰ See n.19, *supra*.

the very real likelihood that, while the petition for trust status languishes before the federal bureaucracy, the land would once again pass out of tribal possession as a result of a forced sale for unpaid state taxes. If Cass County's argument is accepted, and this Court holds that all Indian-owned alienable land is subject to taxation, the fee to trust process authorized in the Indian Reorganization Act of 1934 and set forth in 25 C.F.R. § 151 will be substantially disrupted.

CONCLUSION

For the foregoing reasons, amici Hoopa Valley Tribe, the Nez Perce Tribe, the Quinault Indian Nation and the Spokane Tribe of Indians respectfully request that the decision of the Eighth Circuit Court of Appeals be affirmed.

Respectfully submitted,

PHILIP BAKER-SHENK
VIRGINIA W. BOYLAN
DORSEY & WHITNEY LLP
1330 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036
(202) 452-6900
LYNDEE WELLS
DORSEY & WHITNEY LLP
Second & Seneca Building
1191 Second Avenue, Suite 1440
Seattle, WA 98101
(206) 654-5400

MICHAEL J. WAHOSKE
Counsel of Record
VERNLE C. DAROCHER, JR.
LAURA A. PAGANO
DORSEY & WHITNEY LLP
Pillsbury Center South
220 South Sixth Street
Minneapolis, MN 55402
(612) 340-8755
Counsel for Amici Curiae

January 20, 1998

In The
Supreme Court of the United States

October Term, 1997

CASS COUNTY, MINNESOTA; SHARON K.
ANDERSON, in her official capacity as Cass County
Auditor; MARGE L. DANIELS, in her official capacity
as Cass County Treasurer; STEVE KUHA, in his official
capacity as Cass County Assessor; JAMES DEMGEN, in
his official capacity as Cass County Commissioner;
JOHN STRANNE, in his official capacity as Cass
County Commissioner; GLEN WITHAM, in his official
capacity as Cass County Commissioner; ERWIN
OSTLUND, in his official capacity as Cass County
Commissioner; VIRGIL FOSTER, in his official
capacity as Cass County Commissioner,

Petitioners,

v.

LEECH LAKE BAND OF CHIPPEWA INDIANS,

Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The Eighth Circuit

**BRIEF AMICUS CURIAE OF THE NATIONAL
CONGRESS OF AMERICAN INDIANS
IN SUPPORT OF THE RESPONDENT**

TRACY A. LABIN
KIM JEROME GOTTSCHALK*
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760

*Counsel for the National Congress
of American Indians*

**Counsel of Record*

January 1998

TABLE OF CONTENTS

	Page
INTEREST OF THE AMICUS	1
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT	3
I THERE IS NO EXPRESS LANGUAGE AUTHORIZING THE TAXATION OF LAND PATENTED AS HOMESTEADS OR PINE LANDS UNDER THE NELSON ACT, AND THUS THE COUNTY IS WITHOUT AUTHOR- ITY TO IMPOSE TAXES WHERE THE LAND TODAY IS OWNED BY THE LEECH LAKE BAND WITHIN THE BOUNDARIES OF ITS RESERVATION.....	3
II IN THE ABSENCE OF EXPRESS LANGUAGE AUTHORIZING TAXATION, THE FACT THAT CONGRESS REPUDIATED THE ALLOTMENT ERA LEGISLATION AND ENACTED COM- PREHENSIVE LEGISLATION SUPPORTING TRIBES AS SELF-GOVERNING ENTITIES WITHIN PERMANENT, SELF-SUSTAINING HOMELANDS COMPELS AN INTERPRETA- TION THAT THE HOMESTEAD AND PINE LANDS PROVISIONS DO NOT AUTHORIZE THE COUNTY'S TAXATION OF THESE LANDS NOW HELD IN FEE BY THE LEECH LAKE BAND WITHIN THE BOUNDARIES OF ITS RESERVATION.....	5
A This Court Consistently Weighs Intervening Legislation In Interpreting Indian Legislation Whose Policy Has Been Repudiated	5
B Congress Has Thoroughly Repudiated Allotment Policy.....	8

TABLE OF CONTENTS - Continued

	Page
C Intervening Legislation Since The Nelson Act Forecloses County Authority To Tax Repurchased Homesteads And Pine Lands ..	11
1. Indian Reorganization Act	11
2. Indian Country Statute	16
3. Indian Civil Rights Act	17
4. Indian Self-Determination Act And Tribal Self-Governance Act	18
CONCLUSION	21

TABLE OF AUTHORITIES

Page

CASES

<i>Bryan v. Itasca County</i> , 426 U.S. 373 (1976)	3, 4, 5, 7, 8, 18
<i>California v. Cabazon Band of Mission Indians</i> , 480 U.S. 202 (1987)	2, 4, 15, 16
<i>Cherokee Nation v. Georgia</i> , 5 Pet. 1, 8 L. Ed. 25 (1831)	3
<i>County of Yakima v. Yakima Indian Nation</i> , 502 U.S. 251 (1992)	2, 4, 13, 14
<i>DeCoteau v. District County Court</i> , 420 U.S. 425 (1975)	16
<i>Goudy v. Meath</i> , 203 U.S. 146 (1906)	7, 12
<i>Hodel v. Irving</i> , 481 U.S. 704 (1987)	11, 15
<i>Leech Lake Band of Chippewa Indians v. Cass County</i> , 108 F.3d 820 (8th Cir. 1997)	1
<i>McClanahan v. Arizona Tax Commission</i> , 411 U.S. 164 (1973)	20
<i>Menominee Tribe v. United States</i> , 391 U.S. 404 (1968)	3, 7
<i>Mescalero Apache Tribe v. Jones</i> , 411 U.S. 145 (1973)	15
<i>Moe v. Salish & Kootenai Tribes of the Flathead Reser- vation</i> , 425 U.S. 463 (1976)	3, 4, 5, 6, 12
<i>Montana v. Blackfeet Tribe of Indians</i> , 471 U.S. 759 (1985)	3, 4
<i>National Farmers Union Insurance Cos. v. Crow Tribe</i> , 471 U.S. 845 (1985)	3

TABLE OF AUTHORITIES - Continued

	Page
<i>New Mexico v. Mescalero Apache Tribe</i> , 462 U.S. 324 (1983)	4, 11, 20
<i>Oklahoma Tax Comm'n v. Chickasaw Nation</i> , 515 U.S. 450 (1995)	17
<i>Oklahoma Tax Comm'n v. Sac and Fox Nation</i> , 508 U.S. 114 (1993)	17
<i>Oklahoma Tax Comm'n v. Potawatomi Tribe</i> , 498 U.S. 505 (1991)	4
<i>Santa Clara Pueblo v. Martinez</i> , 436 U.S. 49 (1978)	3
<i>Santa Rosa Band of Indians v. Kings County</i> , 532 F.2d 655 (9th Cir. 1975)	8
<i>Seymour v. Superintendent</i> , 368 U.S. 351 (1962) ..	3, 5, 16
<i>United States v. Mazurie</i> , 419 U.S. 544 (1975)	17
<i>United States v. Wheeler</i> , 435 U.S. 313 (1978)	3
<i>Washington v. Confederated Tribes of the Colville Indian Reservation</i> , 447 U.S. 134 (1980)	4, 20
UNITED STATES STATUTES	
18 U.S.C. § 1151	16, 17
25 U.S.C. § 352a	14
25 U.S.C. § 352b	14
25 U.S.C. § 2502(f)	18
General Allotment Act of 1887, 25 U.S.C. §§ 331-349	2
25 U.S.C. § 349	7, 12

TABLE OF AUTHORITIES - Continued

	Page
Indian Civil Rights Act, 25 U.S.C. §§ 1301-1341	17
Title IV 25 U.S.C. §§ 1321-1326	7
Indian Financing Act, 25 U.S.C. § 1451	20
Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479	11
25 U.S.C. § 461	12
25 U.S.C. § 462	12
25 U.S.C. § 463	12
25 U.S.C. § 465	12
Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450-450n, 458aa-hh (1983 & 1997 Supp.)	19
25 U.S.C. § 450a	19
Nelson Act of 1889, ch. 24, 25 Stat. 642	1
Pub. L. No. 83-280, 67 Stat. 588 (1953)	18
Tribal Justice Act, 25 U.S.C. § 3601 (1997 Supp.)	20
Tribal Self-Governance Act, Pub. L. 103-413, Title II, 108 Stat. 4270 (1994), 25 U.S.C. §§ 458aa-458hh	19
Tribal Self-Governance Demonstration Project Act of 1991, Pub. L. 102-184, 105 Stat. 1278	19
Tribally Controlled Schools Act of 1988, 25 U.S.C. § 2501(7)	20

TABLE OF AUTHORITIES - Continued

Page

LEGISLATIVE MATERIALS

To Grant to Indians Living Under the Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearings on S. 2755 Before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess. 18 (1934).....	10
78 Cong. Rec. S11, (daily ed. June 12, 1934) (Statement of Sen. Wheeler).....	11
H.R. Rep. No. 1804, 73d Cong, 2d Sess; 6 (1934)	15

EXECUTIVE MATERIALS

Statement by President Richard Nixon, President's Special Message to Congress on Indian Affairs, Pub.Papers 564-76 (Jul. 8, 1970).....	20
Statement by President Ronald Reagan, Statement on Indian Policy, 19 Weekly Comp.Pres.Doc. 98 (Jan. 24, 1983).....	20
Statement by President William J. Clinton, Address at Tribal Leaders Event (April 29, 1994) U.S. Department of Interior, Bureau of Indian Affairs, vol. 18, no.4 (1994).....	20

OTHER AUTHORITIES

Felix S. Cohen, <i>Handbook of Federal Indian Law</i> (1942 ed.)	6
Felix S. Cohen, <i>Handbook of Federal Indian Law</i> (1982 ed.)	9, 17

TABLE OF AUTHORITIES - Continued

Page

<i>Institute for Government Research, The Problem of Indian Administration</i> (L. Meriam ed., Baltimore: The John Hopkins Press, 1928).....	10
Judith V. Royster, <i>The Legacy of Allotment</i> , 27 Ariz. St. L.J. 1 (1995).....	9
W. Washington, <i>Red Man's Land/White Man's Law</i> 145 (1971).....	13

INTEREST OF THE AMICUS¹

Amicus Curiae, National Congress of American Indians (NCAI), is the oldest and largest national organization of Indian governments and individuals in the United States. NCAI is dedicated to protecting the rights and improving the welfare of American Indians and Alaska Natives, enlightening the public toward a better understanding of Indian people, and preserving rights under Indian treaties and agreements with the United States. Many of NCAI's members have been adversely affected by the era of allotment and the sale of "surplus" lands and have suffered corresponding harm to their sovereignty. NCAI and its members have a vital interest in ensuring that the effects of the allotment era are not extended in this case.



INTRODUCTION AND SUMMARY OF ARGUMENT

The Leech Lake Band of Chippewa Indians (Band) resides on the reservation homeland set aside for it from its aboriginal territory. This reservation has never been disestablished or diminished. *Leech Lake Band of Chippewa Indians v. Cass County*, 108 F.3d 820, 822 (8th Cir. 1997). Nevertheless, the Band's reservation was allotted and some of its "surplus" land sold pursuant to the Nelson Act of 1889, ch. 24, 25 Stat. 642, which implemented the

¹ Counsel for Petitioners and Counsel for Respondents have consented to the filing of the Brief *Amicus Curiae*. The consents are submitted for filing herewith.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

policy of the General Allotment Act of 1887 (GAA), 24 Stat. 388 (codified at 25 U.S.C. §§ 331-349), within the Band's reservation. Some of the allotments passed into fee ownership by non-Indians. In addition, the Nelson Act provided for the sale of "surplus" land directly to non-Indians in fee. Some of these lands were sold under the general homestead laws, while lands classified as "pine lands" were sold pursuant to the specific procedures of the Nelson Act. Recently, in an effort to alleviate some of the devastation caused by the allotment era, the Band repurchased parcels of fee land in all three categories: lands previously allotted, pine lands, and homestead lands.

This Court held, in *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251 (1992), that lands which had been allotted under the GAA are taxable once a fee patent issues, even if acquired later by a Tribe. Shortly after that decision, Cass County (County) imposed taxes on all lands repurchased by the Band, not just those which had been allotted under the GAA. The Band brought suit to prevent such taxation. The Court of Appeals decided that *Yakima* supported the County's authority to tax the lands which had been previously allotted. As to the pine lands and homesteads, the Court of Appeals held that there was not the required clear congressional authorization and therefore the County could not tax those lands. This Court granted certiorari to review the issue of the County's taxing authority over the pine lands and homestead lands.

The Court of Appeals' decision that the County lacks authority to tax the pine lands and homestead parcels now owned by the Band is correct. There is no clear congressional authorization of such taxation as is required by this Court. *California v. Cabazon Band of Mission Indians*, 480

U.S. 202, 215 n.17 (1987); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765 (1985). Furthermore, the policies underlying the allotment and "surplus" lands era have been repudiated by Congress in extensive legislation that supports tribal self-determination and self-sufficient tribal homelands. This Court has consistently followed Congress' lead when interpreting repudiated Indian policies in the light of intervening legislation. *Bryan v. Itasca County*, 426 U.S. 373 (1976); *Moe v. Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976); *Menominee Tribe v. United States*, 391 U.S. 404 (1968); *Seymour v. Superintendent*, 368 U.S. 351 (1962). The Court should follow Congress' lead in this case and affirm the Court of Appeals' decision that the County lacks taxing authority over pine lands and homesteads now owned by the Band.

ARGUMENT

I. THERE IS NO EXPRESS LANGUAGE AUTHORIZING THE TAXATION OF LAND PATENTED AS HOMESTEADS OR PINE LANDS UNDER THE NELSON ACT, AND THUS THE COUNTY IS WITHOUT AUTHORITY TO IMPOSE TAXES WHERE THE LAND TODAY IS OWNED BY THE LEECH LAKE BAND WITHIN THE BOUNDARIES OF ITS RESERVATION

Indian tribes are sovereign entities whose inherent sovereignty precedes that of the United States itself. *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 851 (1985); *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Even after their incorporation into the United States, they remain "'domestic dependent nations' that exercise inherent sovereign authority over their members and territories. *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L. Ed. 25

(1831).” *Oklahoma Tax Commn. v. Potawatomi Tribe*, 498 U.S. 505, 509 (1991). Tribal sovereignty thus contains a “significant geographical component.” *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 n.18 (1983). Tribes’ sovereignty is subordinate only to the Federal Government, not the states, and states may not tax Indian land within Indian country unless Congress has made its intention to authorize such taxation “unmistakably clear.” *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765 (1985); *Washington v. Confederated Tribes*, 447 U.S. 134, 153-54 (1980); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987); *County of Yakima v. Yakima Nation*, 502 U.S. 251 (1992).

There is no express language in the Nelson Act authorizing the taxation of land sold as pine lands or as homesteads. This lack of express congressional authorization should end the matter. The lands are not subject to taxation. See *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976) (general language which made allottees “subject to the laws . . . of the state” did not explicitly subject allottees to plenary taxing jurisdiction of state); *Bryan v. Itasca County*, 426 U.S. 373 (1976) (general language extending “civil laws . . . of general application” was not an express congressional grant of power to tax reservation Indians); But see *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251 (1992) (express language stating that “all restrictions . . . to taxation . . . shall be removed” manifested clear congressional intent to permit in rem taxation) (emphasis added). If there is any question about this result, however, all doubt should be eliminated by the fact that the allotment policy under which the land was originally disbursed has been thoroughly repudiated

and Congress has firmly committed to a policy of self-determination.

II. IN THE ABSENCE OF EXPRESS LANGUAGE AUTHORIZING TAXATION, THE FACT THAT CONGRESS REPUDIATED THE ALLOTMENT ERA LEGISLATION AND ENACTED COMPREHENSIVE LEGISLATION SUPPORTING TRIBES AS SELF-GOVERNING ENTITIES WITHIN PERMANENT, SELF-SUSTAINING HOMELANDS COMPELS AN INTERPRETATION THAT THE HOMESTEAD AND PINE LANDS PROVISIONS DO NOT AUTHORIZE THE COUNTY’S TAXATION OF THESE LANDS NOW HELD IN FEE BY THE LEECH LAKE BAND WITHIN THE BOUNDARIES OF ITS RESERVATION

A. This Court Consistently Weighs Intervening Legislation In Interpreting Indian Legislation Whose Policy Has Been Repudiated.

The Court has consistently followed Congress’ lead, as expressed in intervening legislation, when interpreting Indian legislation whose underlying policy has been repudiated. Specifically, this Court has looked to intervening legislation to ensure that its interpretation of a particular statute is consistent with current policy and also to clarify ambiguities. *Seymour v. Superintendent*, 368 U.S. 351, 358 (1962); *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *Bryan v. Itasca County*, 426 U.S. 373 (1976).

In *Seymour v. Superintendent*, the question was whether the “South Half” of the Colville Reservation was under exclusive federal criminal jurisdiction or whether the reservation had been diminished so as to provide state criminal jurisdiction over a crime committed by an Indian on fee-patented land owned by a non-Indian. To

determine whether the reservation had been diminished, the Court looked to a 1906 Act which opened the South Half to allotment and sale of surplus lands under the homestead laws. Because there was no language "expressly vacating the South Half of the reservation and restoring that land to the public domain," the Court held that the 1906 Act did not diminish the reservation. 368 U.S. at 355. The Court looked to later congressional enactments to confirm that its interpretation of the 1906 Act was correct: "That this is the proper construction of the 1906 Act finds support in subsequent congressional treatment of the reservation. Time and time again in statutes enacted since 1906, Congress has explicitly recognized the continued existence as a federal Indian reservation of this South Half. . . ." *Id.* at 356.

The Court also looked to later congressional enactments to answer the state's argument that even if the 1906 Act did not completely diminish the reservation, the reservation had been diminished at least as to land patented to non-Indians. Specifically, the Court stated:

This contention is not entirely implausible on its face, and indeed, at one time had the support of distinguished commentators on Indian law. But the issue has since been squarely put to rest by congressional enactment of the currently prevailing definition of Indian country in § 1151 to include "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent. . . ."

368 U.S. 357-58 (referring to Felix S. Cohen, *Handbook of Federal Indian Law*, 359 (1942 ed.)) (emphasis added) (footnote omitted).

In *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976), the Court rejected Montana's claim to reservation-wide taxing jurisdiction. Montana relied largely on Section 6 of the GAA, 25 U.S.C. § 349, which made Indians "subject to the laws . . . of the State . . ." once they received a patent in fee and on *Goudy v. Meath*, 203 U.S. 146 (1906), which held that this phrase included state tax laws. The Court rejected these arguments even as to Indians residing on reservation fee lands, noting that the policy of allotment and sale of surplus land had been repudiated by the Indian Reorganization Act. 425 U.S. at 479. See further discussion at Section II.C.1, *infra*.

In *Bryan v. Itasca County*, 426 U.S. 373 (1976), the Court addressed the issue of "whether the grant of civil jurisdiction to the States conferred by § 4 of Pub. L. 280 . . . is a congressional grant of power to the States to tax reservation Indians. . . ." 426 U.S. at 375. Recognizing the general rule that State taxing authority does not extend within an Indian reservation absent express authority, the Court looked for such authority in the language of § 4 and its legislative history, and found none. The Court then looked to later congressional enactments, noting that "we previously have construed the effect of legislation affecting reservation Indians in light of 'intervening' legislative enactments." *Id.* at 386 (citations omitted). The Court concluded that its interpretation refusing state taxing jurisdiction was consistent with the later enacted Title IV of the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1321-1326, which required tribal consent to a state's assumption of jurisdiction.¹ *Cf. Menominee Tribe v.*

¹ Additionally, the Court found that in construing an ambiguous statute, "we must be guided by that 'eminently

United States, 391 U.S. 404 (1968) (interpreting Menominee Termination Act in light of subsequent P.L. 280 to hold that hunting and fishing rights saved by the latter were not terminated by the former.)

In this case, the Court should follow its normal course and weigh the intervening legislation since the Nelson Act. If it does so, the only outcome consistent with congressional intent is to deny the County's authority to tax the homestead and pine lands acquired by the Band. To hold otherwise the Court would have to "strain to implement [an assimilationist] policy Congress has now rejected," a course of action this Court has rejected, "particularly where to do so [would] interfere with the present congressional approach to what is, after all, an ongoing relationship." *Bryan*, 426 U.S. at 388 n.14 (quoting *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 663 (9th Cir. 1975)).

B. Congress Has Thoroughly Repudiated Allotment Policy

Since the founding of the United States, federal Indian policy has evolved and changed several times. One of the earliest periods of Indian policy is known as the removal and reservation period. During that period,

sound and vital canon,' that 'statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians.' This principle of statutory construction has particular force in the face of claims that ambiguous statutes abolish by implication Indian tax immunities . . . " 426 U.S. at 392 (citations omitted).

the United States negotiated numerous treaties similar to that it negotiated with the Leech Lake Band, whereby huge areas of aboriginal territory were surrendered and separate, sharply-circumscribed, reservations were set aside as homelands for the tribes. Then, beginning late in the nineteenth century, Congress moved to a policy of breaking up reservations and apportioning land to individual Indians in order to encourage Indians to adopt an agrarian lifestyle and to assimilate into general American society. See Felix S. Cohen, *Handbook of Federal Indian Law*, 131-32 (1982 ed.). During this ill-conceived² period of

² That the policy was ill-conceived is not simply hindsight. The record was there for all to read. Allotment had been tried on a small scale in previous treaties, a number of them negotiated by former Commissioner of Indian Affairs, George Manypenny. His pre-General Allotment Act appraisal, in 1885, of the legacy of those attempts is as follows:

When I made those treaties I was confident that good results would follow. Had I not so believed I would not have been a party to the transactions. Events following the execution of these treaties proved that I had committed a grave error. I had provided for the abrogation of the reservations, the dissolution of the tribal relation, and for lands in severalty and citizenship; thus making the road clear for the rapacity of the white man. I had broken down every barrier. I had committed a greivous (sic) mistake, and entailed on the Indians a legacy of cruel wrong and injury. Had I known then, as I now know, what would result from those treaties, I would be compelled to admit that I had committed a high crime.

Quoted in Judith V. Royster, *The Legacy of Allotment*, 27 *Ariz. St. L.J.* 1, 63 (1995).

allotment and assimilation, many tribes had their reservations allotted, their "surplus" lands sold, and their territories correspondingly decimated. During this period, the already restricted land base was reduced from 134 million acres to approximately 44 million. Approximately 27 million acres were lost due to allotment, and another 60 million acres were lost due to the selling of "surplus" lands. *Id.* at 138.

As evidenced by a 1928 report, *Institute for Government Research, The Problem of Indian Administration* (L. Meriam ed., Baltimore: The Johns Hopkins Press, 1928) ("Meriam Report"), the results of the land loss were disastrous. The overwhelming majority of Indian people were pauperized. Living in destitution, Indian people suffered some of the highest malnutrition and mortality rates, and the lowest levels of education and standard of living of any group in the United States. *See generally*, Meriam Report. As the then Commissioner of Indian Affairs, John Collier, reported to Congress about the allotment policy:

It is difficult to imagine any other system which with equal effectiveness would pauperize the Indian while impoverishing him, and sicken and kill his soul while pauperizing him, and cast him in so ruined a condition into the final status of a nonward dependent upon the States and counties.

To Grant to Indians Living Under the Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearings on S. 2755 Before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess. 18

(1934) (memorandum presented into record by John Collier, Commissioner of Indian Affairs).³

In time, Congress acknowledged that there was a significant nexus between a sufficient land base and the economic and cultural survival of Indian tribes. *See* 78 Cong. Rec. S11 (daily ed. June 12, 1934) (Statement of Sen. Wheeler). Thus Congress repudiated the allotment policy through the Indian Reorganization Act of 1934, Ch. 576, 48 stat. 984 (codified as amended at 25 U.S.C. §§ 461-479 (1983)); *See Hodel v. Irving*, 481 U.S. 704, 708 (1987). In the years since that repudiation, Congress has made ever more clear that reservations are permanent homelands within which tribes are to attain the greatest degree of self-determination and self-sufficiency possible. Today, as this Court has recognized "both the tribes and the Federal Government are firmly committed to the goal of promoting tribal self-government, a goal embodies (sic) in numerous federal statutes." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-335 (1983).

C. Intervening Legislation Since The Nelson Act Forecloses County Authority To Tax Repurchased Homesteads And Pine Lands

1. Indian Reorganization Act.

The primary expression of Congressional intent repudiating the era of allotment and sale of "surplus" lands is of course the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. §§ 461-479. Through the IRA, Congress stopped all

³ A comprehensive discussion of this era and its continuing effects on Indian law is contained in Royster, *supra*.

further allotment, 25 U.S.C. § 461, indefinitely extended existing periods of trust and restrictions on alienation, 25 U.S.C. § 462, and authorized the Secretary of the Interior to restore to tribal ownership any reservation lands that had not been allotted, 25 U.S.C. § 463, and "to provide land for Indians." 25 U.S.C. § 465.

This Court has previously considered the effects of the IRA on prior legislation. In *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976), this Court looked to the IRA and to other legislation to determine whether § 6 of the General Allotment Act (GAA) authorized state imposition of reservation-wide cigarette sales, personal property taxes and vendor-licensing fees. The State relied upon language in the GAA, 25 U.S.C. § 349, which subjected the allottees "to the laws . . . of the State" once they received a patent in fee and on *Goudy v. Meath*, 203 U.S. 146 (1906), which held that this phrase included state tax laws. After finding that the GAA itself precluded imposition of taxes on trust land, the Court looked to intervening legislation to interpret what the general phrase "laws of the State" meant for the fee patents. The Court held that due to the effects of the IRA and other legislation, the state lacked jurisdiction on the fee land as well. On this point the Court stated:

The State has referred us to no decisional authority – and we know of none – giving the meaning for which it contends to § 6 of the General Allotment Act in the face of many and complex intervening jurisdictional statutes directed at the reach of state law within reservation lands – statutes discussed, for example, in *McClanahan*, 411 U.S., at 173-179. . . . Congress by its more modern legislation has evinced a clear

intent to eschew any such 'checkerboard' approach within an existing Indian reservation, and our cases have in turn followed Congress' lead in this area.

425 U.S. at 479. (emphasis added) (citations omitted).

In *Yakima*, the Court again considered the effects of the IRA on allotment era legislation. The Court recognized that "[i]n light of Congress' repudiation in 1934 of the policies behind the General Allotment Act, we concluded [in *Moe*] that the Act could no longer be read to provide Montana plenary jurisdiction even over those Indians residing on reservation fee lands." *County of Yakima v. Yakima Nation*, 502 U.S. 251, 261 (1992). However, in *Yakima*, the Court refused to find that the IRA implicitly repealed what it found to be an explicit congressional grant of taxing authority over land allotted under the GAA. 502 U.S. at 262.

Yakima is not controlling here, however, even if it was itself correctly decided.⁴ In this case, Congress did not

⁴ *Amicus* respectfully suggests that *Yakima* itself was incorrectly decided. The Court stated:

Except by authorizing reacquisition of allotted lands in trust, however, Congress made no attempt to undo the dramatic effects of the allotment years on the ownership of former Indian lands. It neither imposed restraints on the ability of Indian allottees to alienate or encumber their fee-patented lands nor impaired the rights of those non-Indians who had acquired title to over two-thirds of the Indian lands allotted under the Dawes Act. See *W. Washburn, Red Man's Land/White Man's Law* 145 (1971). . . . And when Congress, in 1934, while putting an end to further allotment of reservation land, chose not to return allotted land to

explicitly grant the county's taxing authority over the pine lands or over the homestead parcels.⁵ Therefore,

pre-General Allotment Act status, leaving it fully alienable by the allottees, their heirs, and assigns, it chose not to terminate state taxation upon those lands as well.

502 U.S. at 255-256, 264 (emphasis in original) (citations omitted). This characterization of Congress' failure to totally repudiate the effects of the Allotment era and the effects of that failure at total repudiation are incorrect. The Court's characterization fails to appreciate the practical restraints under which Congress was acting. To impair the rights of non-Indians who had acquired property interests protected by the Fifth Amendment would have cost the federal government untold millions of dollars at a time of severe depression in the economy. A blanket reimposition of trust status would also have implicated fifth amendment interests since Congress could not have known which lands had been put up as security for loans.

That this was Congress' concern was made clear by the passage in 1927 of legislation authorizing the taking back into trust of lands where such lands had not been mortgaged or sold. 25 U.S.C. § 352a. That remedy was later extended in 1931 to land which had been mortgaged, but was now free and clear. 25 U.S.C. § 352b. Congress' concern not to impair non-Indian rights to property, in no way indicates a choice not to terminate state authority to tax those lands. There is no protected Fifth Amendment right in the County to continue taxing land which passes into Indian ownership.

⁵ In *Yakima*, the Court found that the land was freed of all restriction as to taxation. One of the restrictions removed was the normal rule of federal Indian law that land owned by an Indian or by a tribe within Indian country is outside of state taxing authority. In other words, *Yakima* construed the GAA as effectuating a change in the normal rule that such taxing authority does not exist. Here, there is no language changing the ordinary rule. The land that passed to non-Indian ownership as pine lands or homesteads became taxable consistent with the

there is no argument that the IRA repeals an explicit grant of authority. Rather, *amicus* urges this Court to look to the IRA to inform the interpretation that Congress did not authorize the County's jurisdiction to tax the homestead and pine lands parcels once they were reacquired by the Band.

As this Court has recognized, the "intent and purpose of the IRA was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'" *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (quoting H.R. Rep. No. 1804, 73d Cong, 2d Sess; 6 (1934)). In addition, the IRA was meant to consolidate Indian lands, "a public purpose of high order." *Hodel v. Irving*, 481 U.S. 704, 712 (1987). The Band took precisely the type of initiative supported by the IRA when it purchased the lands at issue here.⁶ It was using self-help to remedy the effects of the allotment era – a result clearly intended by Congress through the IRA. *Amicus* urges this Court to

normal rule that state taxing authority does extend to non-Indian property within Indian country. But upon repurchase by the Band, nothing interferes with operation of the normal rule that state taxing authority does not extend to Indian land within Indian country. See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987) (holding that there is a per se rule against state taxation of tribes and tribal members within Indian country).

⁶ The Band paid for the land, so there is no Fifth Amendment problem. The county has no protected property interest in the right to tax land within Indian country anymore than it has such an interest in taxing newly purchased property belonging to non-profit organizations or the federal government.

recognize the clear congressional intent to reverse the policy of allotment and to foster the growth of tribal land bases evidenced in the IRA, and to give meaning to that intent by confirming that the homestead parcels and pine lands owned by the Band are not taxable. To hold otherwise, would be giving renewed life to the repudiated allotment policy, for lands subject to tax will again be subject to loss.

2. Indian Country Statute

The Indian Country statute, passed in 1948, reads in relevant part:

Except as otherwise provided in sections 1154 and 1156 of this title, the term 'Indian Country,' as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation. . . .

18 U.S.C. § 1151.

This is the precise provision that this Court turned to in *Seymour v. Superintendent*, 368 U.S. 351 (1962), to hold that the state did not acquire criminal jurisdiction over crimes committed by Indians on fee land owned by non-Indians within the boundaries of a reservation. Since *Seymour* was decided, this Court has made it clear that the § 1151 definition of Indian country applies to civil jurisdiction as well as criminal jurisdiction. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207, n.5 (1987); *DeCoteau v. District County Court*, 420 U.S. 425,

427, n.2 (1975). In particular, this Court has held that § 1151 is the applicable definition for determining state taxing jurisdiction. *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114 (1993). *Sac and Fox* held that in determining whether the rule against state taxation of tribes or individual Indians applies, "we ask only whether the land is Indian country." 508 U.S. at 125. In describing Indian country, the Court cited 18 U.S.C. § 1151. *Id.* at 123. See also, *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 453 n.2 (1995).

The land at issue here is Indian country within the definition of § 1151. And, as in *Moe*, this Court should view this statute as an important piece of intervening legislation arguing against state jurisdiction over lands within Indian country. Cf. *United States v. Mazurie*, 419 U.S. 544, 554-55 (1975). *Amicus* urges this Court to apply the principles of Indian country to these lands and to recognize that these lands, like the rest of Indian country, constitute "the special territory where Indians are governed primarily by tribal and federal law rather than state law." Cohen (1982 ed.), at 28.

3. Indian Civil Rights Act.

The Indian Civil Rights Act was passed in 1968, Pub. L. No. 90-284, 82 Stat. 77 (codified at 25 U.S.C. §§ 1301-1341). "As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). In passing the Indian Civil Rights Act, Congress modified

this situation somewhat "by imposing certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment." *Id.* at 57. In addition, the Act abrogates prior law to the contrary and provides that Indian tribes must give prior consent before states may assume civil or criminal jurisdiction over Indian country. *Id.* at 63-64.

It was the requirement for tribal consent which this Court took into account in *Bryan v. Itasca County*, 426 U.S. 373 (1976), in deciding that P.L. 280, another piece of assimilationist legislation, did not grant states regulatory jurisdiction over Indian country. As in *Bryan*, a finding here that the County lacks the authority to tax tribally owned land patented as homesteads or pine lands is consistent with the Indian Civil Rights Act.

4. Indian Self-Determination Act And Tribal Self-Governance Act.

Since repudiating the allotment policy with the passage of the IRA, Congress has striven with ever-increasing awareness and clarity to confirm tribes as self-governing entities within permanent homelands.⁷ One of the most significant congressional pronouncements of current federal policy is the Indian Self-Determination

⁷ This is not to say that Indian policy has been altogether free of schizophrenia since 1934. For a brief period, mainly in the 1950s, Congress experimented with the assimilationist policy of termination. The policy of termination lasted only a short while and Congress has officially repudiated and rejected "House Concurrent Resolution 108 of the 83rd Congress and any policy of unilateral termination of Federal relations with any Indian Nation." 25 U.S.C. § 2502(f).

and Education Assistance Act of 1975, 25 U.S.C. §§ 450-450n, 458aa-hh (1983 & 1997 Supp.), which provides for the contracting of federal services to Indian tribes. Through this Act, Congress clearly stated its intent to preserve and promote Indian tribes. The Declaration of Policy states that:

Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.

25 U.S.C. § 450a (1983 & 1997 Supp.).

The Indian Self-Determination Act was enhanced by passage of the Tribal Self-Governance Demonstration Project Act of 1991, Pub. L. 102-184, 105 Stat. 1278, and the Tribal Self-Governance Act, Pub. L. 103-413, Title II, 108 Stat. 4270 (1994) (codified at 25 U.S.C. §§ 458aa-458hh. (1997 Supp.)). In resounding support for tribal self-governance, Congress stated

It is the policy of this title to permanently establish and implement tribal self-governance -

... to enable the United States to maintain and improve its unique and continuing relationship with, and responsibility to, Indian tribes ... to ensure the continuation of the trust responsibility of the United States to Indian tribes and

Indian individuals . . . [and] . . . to permit an orderly transition from Federal domination of programs and services to provide Indian tribes with meaningful authority to plan, conduct, redesign, and administer programs, services, functions, and activities that meet the needs of the individual tribal communities. . . .

Section 203 of Pub. L. 103-413.

Congress has expressed in straightforward terms its support for tribes to be self-governing to the greatest extent possible.⁸ Tribal sovereignty and self-government do not, however, occur within a vacuum, they have a geographical component. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 n.18 (1983). Within a tribe's territory, its sovereignty is subject only to federal, not state authority. *Washington v. Confederated Tribes*, 447 U.S. 134, 153-154 (1980); *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 173-179 (1973). To the extent that a tribe loses a

⁸ Other expressions of this support are found in the Indian Financing Act, 25 U.S.C. § 1451 (stating that it is Congress' policy that Indians "fully exercise responsibility for the utilization and management of their own resources"); the Tribal Justice Act, 25 U.S.C. § 3601 (1997 Supp.) (recognizing "the self-determination, self-reliance, and inherent sovereignty of Indian tribes"); and Tribally Controlled Schools Act of 1988, 25 U.S.C. § 2501(7). In addition, commitment to the current policy of self-determination has also been vigorously promoted by the executive branch. See Statement by President Richard Nixon, President's Special Message to Congress on Indian Affairs. Pub.Papers 564-76 (Jul. 8, 1970); Statement by President Ronald Reagan, Statement on Indian Policy, 19 Weekly Comp.Pres.Doc. 98 (Jan. 24, 1983); President Clinton, Address at Tribal Leaders Event (April 29, 1994), reprinted in U.S. Department of Interior, Bureau of Indian Affairs, vol. 18, no.4 (1994).

measure of sovereignty over its territory, its ability to self-govern is impaired and congressional policy is thwarted. To allow the County a measure of sovereignty over the Band's land in this case is to thwart Congress' policy of self-determination for Indian tribes.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals as to the homestead parcels and pine lands should be affirmed.

Respectfully submitted,

TRACY A. LABIN
KIM JEROME GOTTSCHALK*
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760

*Counsel for the National Congress
of American Indians*

**Counsel of Record*

January 1998